Supreme Court, U.S
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No. _____

In The
Supreme Court of the United States

PATRICK L. KAHAWAIOLAA, VIRGIL E. DAY, and SAMUEL L. KEALOHA, JR., JOSIAH L. HOOHULI, and KA LAHUI HAWAI'I

Petitioners,

v.

GALE A. NORTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether U. S. Department of the Interior regulations which preclude groups of indigenous Hawaiians from applying for recognition that they exist as Indian tribes, pursuant to 25 C.F.R, Part 83, violate the Equal Protection component of the Fifth Amendment of the United States Constitution?

TABLE OF CONTENTS

Questions Presented I

Table of Authorities Iii

Citations of Reports of Opinions and Orders 1

Jurisdiction 1

Statutes and Rules Involved in the Case 1

Statement of the Case 2

Reasons Relied upon for Allowance of the Writ 2

Conclusion 6

Appendix

Opinion of the Ninth Circuit Court of Appeals, filed October 27, 2004 ..... A-1

Order Granting Defendant's Motion to Dismiss and Denying Plaintiffs' Counter-Motion for Summary Judgment, filed August 30, 2002 ..... A-22

TABLE OF AUTHORITIES

Cases cited:

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) . 6
Kahawaiolaa v. Norton, 386 F.3d 1271 (9th Cir. 2004)
F.3d 1271 (9 1
Kahawaiolaa v. Norton, 222 F.Supp.2d 1213 (D.Haw. 2002)1
Lassen v. Arizona Highway Dept., 385 U.S. 458 (1967) ... 5
Morton v. Mancari, 417 U.S. 535 (1974) 2
Rice v. Cayetano, 528 U.S. 495 (2000) 2, 3, 5, 6

Statutes cited:

25 U.S.C. § 479 5
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1346 2
28 U.S.C. § 1361 2
28 U.S.C. § 2201 2
28 U.S.C. §§ 1331 2
Fifteenth Amendment, U.S. Constitution 3
Hawaii Admission Act, 73 Stat 4, P.L. 86-3, § 4 5
Hawaii Admission Act, 73 Stat 4, P.L. 86-3, Sec. 5(b) ... 5
Hawaii Admission Act, 73 Stat 4, P.L. 86-3, Sec. 5(d) ... 5
Hawaii Admission Act, 73 Stat 4, P.L. 86-3 § 5(f) 5

Rules cited:

25 C.F.R., Part 83 ..... 2, 3, 5
25 C.F.R. § 83.1 ..... 1, 2
25 C.F.R. § 83.2 1
25 C.F.R. § 83.3 ..... 1, 2
25 C.F.R. § 83.7 ..... 3, 4

Other authorities cited:

Benjamin, *Equal Protection and the Special Relationship:*

The Case of Native Hawaiians, 106 Yale L.. J. 537 (1996) 3, 5

Elizabeth M., *The Native Hawaiian and Other Pacific Islander Population: 2000*, U.S.Census Bureau, Census 2000 Brief C2KBR/1-14 (2001) 5

Senate Bill 344 ..... 4, 5

Van Dyke, *The Political Status of the Native Hawaiian People,* 17 Yale L. & Pol'y Rev. 95 (1998)3 .....

In the
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PATRICK L. KAHAWAIOLAA; VIRGIL E. DAY; and SAMUEL L. KEALOHA, JR., JOSIAH L. HOOHULI; and KA LAHUI HAWAI'I,
Petitioners,

v.

GALE NORTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, PATRICK L. KAHAWAIOLAA, *et al.*, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in *Kahawaiolaa v. Norton*, CA. No. 02-17239 (9th Cir, October 27, 2004).

CITATIONS OF REPORTS OF OPINIONS AND ORDERS

The opinion of the the Ninth Circuit Court of Appeals, filed on October 27, 2004, is reported at *Kahawaiolaa v. Norton,* 386 F.3d 1271 (9th Cir. 2004) and is reprinted at page A-1 of the Appendix. The order of the District Court granting Respondent's motion to dismiss and denying Petitioners' motion for summary judgment is reported at *Kahawaiolaa v. Norton,* 222 F.Supp.2d 1213 (D.Haw. 2002) and is reprinted at page A-22 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on October 27, 2004. This Honorable Court has discretionary jurisdiction to review cases in United States

Courts of Appeals by way of writ of certiorari as provided by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

25 C.F.R. § 83.1 Definitions.

As used in this part:

***

Continental United States means the contiguous 48 states and Alaska.

***

Indian group or *group* means any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe.

***

25 C.F.R. § 83.2 Purpose.

The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.

25 C.F.R. § 83.3 Scope.

(a) This part applies only to those American Indian groups indigenous to the continental United States which are not

currently acknowledged as Indian tribes by the Department. It is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

STATEMENT OF THE CASE

On December 11, 2001, the individual Petitioners filed a complaint in the United States District Court for the District of Hawaii for declaratory and injunctive relief against respondent in her official capacity as Secretary of the Department of the Interior of the United States. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1346, 1361, 2201 and 2202. The complaint requests the Court to declare that "The provisions of 25 C.F.R. §§ 83.1 and 83.3 which preclude native Hawaiians from obtaining recognition as and (*sic*) Indian tribe are an unconstitutional racial discrimination in violation of the equal protection component of the Fifth Amendment of the United States Constitution."

On March 15, 2002, Respondent moved to dismiss the complaint on grounds that the complaint "raises political questions over which this court does not have jurisdiction" and that the "regulations Plaintiffs challenge are constitutionally valid exercises of legislative and executive powers."

On March 28, 2002, filed a counter-motion for summary judgment on the grounds that there were no genuine issues of material fact and Plaintiffs were entitled to judgment as a matter of law.

On May 23, 2002, Petitioners, including Petitioner, KA LAHUI HAWAI'I (hereafter "KA LAHUI"), filed an amended complaint for injunctive and declaratory relief, predicating jurisdiction as before. KA LAHUI, was alleged to be a group of indigenous Hawaiians, whose territory at the time of sustained contact was within the area now comprising the state of Hawaii, which desires to apply for federal recognition as an Indian tribe,

pursuant to 25 C.F.R., Part 83.

The amended complaint seeks a declaration that "the provisions of 25 C.F.R. §§ 83.1 and 83.3 which preclude indigenous Hawaiians from obtaining recognition as an Indian tribe are an unconstitutional racial discrimination in violation of the equal protection component of the Fifth Amendment of the United States Constitution."

On August 30, 2002, the district court granted the motion to dismiss on grounds that the complaint raises a political question. App., p. A-39. In a footnote, the district court concluded that even if the court had jurisdiction it would rule that the regulations do not violate the Fifth Amendment when reviewed under the rational basis test, relying largely on *Morton v. Mancari*, 417 U.S. 535 (1974). App., pp. 39-41, fn 14.

On appeal to the Ninth Circuit, the Court of Appeals affirmed. The Court of Appeals held that the political question doctrine did not prevent the district court from having jurisdiction of this case. App., p. A-10. On the merits, the court of appeals held that the discrimination in the rules against indigenous groups from Hawaii was not a racial classification and was, therefore, subject to review on the rational basis standard. App., p. A-13-4.

On applying the rational basis standard the Court of Appeals concluded that the regulations do not violate the equal protection component of the Fifth Amendment based on an historical analysis of differences between indigenous Hawaiians and indigenous peoples in the other 49 states. App., pp. 14-20.

Nevertheless, the court of appeals concluded:

> we would have more confidence in the outcome if the Department of Interior had applied its expertise to parse through history and determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis.

> It would have been equally rational, if perhaps not more so, for the Department to have decided to undertake that inquiry in the first instance.

App. p. 21.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The court of appeals has decided an important question of federal law that has not been, but should be, decided by this Court. The decision of the Court of Appeals below: 1) precludes existing indigenous Hawaiian groups from establishing that they exist as an Indian tribe in the manner established for groups indigenous to the other 49 states; 2) leaves the establishment of a governing entity for indigenous Hawaiians to Congress rather than to the indigenous Hawaiians themselves; 3) will affect the settlement of indigenous Hawaiian land claims; 4) justifies discrimination against indigenous Hawaiians on a non-racial basis while discrimination in favor of indigenous Hawaiians has been held by this Court to be based on race.

In *Rice v. Cayetano*, 528 U.S. 495 (2000) this Court held that a statute of the state of Hawaii limiting the right to vote for Trustees of the Office of Hawaiian Affairs to indigenous Hawaiians was a racial classification prohibited by the Fifteenth Amendment to the United States Constitution. Left undecided in that case were very important and difficult questions pertaining to the relationship between the United States of America and indigenous Hawaiians.

These questions were: whether Congress has determined that indigenous Hawaiians have a status like that of Indians in organized tribes; whether Congress may, and has, delegated authority to the state of Hawaii to preserve that status; and whether Congress may treat indigenous Hawaiians as it does Indian tribes. *Rice v. Cayetano, supra,* 528 U.S. at 518. The Court characterized these issues as "difficult terrain" citing the

opposing views set forth in Van Dyke, *The Political Status of the Native Hawaiian People,* 17 Yale L. & Pol'y Rev. 95 (1998) and Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.. J. 537 (1996). *Rice v. Cayetano, supra.* 528 U.S. at p. 519.

A. The decision below precludes indigenous Hawaiian groups from establishing that they exist as an Indian tribe in the manner established for all other indigenous groups.

Petitioner, KA LAHUI is a group of indigenous Hawaiians who assert tribal sovereignty and believe that they could prove that they meet the criteria for federal recognition set forth in 25 C.F.R. § 83.7, given the opportunity. There are other groups of indigenous Hawaiians who claim tribal sovereignty, such as the Hou Hawaiians, *see* Benjamin, *supra*, at p. 580, 'Ohana Council a.k.a. The Provisional Government of the Independent Nation State of Hawaii, the State Council of Hawaiian Homestead Associations, and the Office of Hawaiian Affairs. *See* Benjamin, *supra*, at p. 578, fn. 173.

Nevertheless, Benjamin argues that indigenous Hawaiians "are not organized into any entity that can reasonably be called a tribe." Benjamin, *supra* at p. 574. It is uncertain how he came to this conclusion, however, as he goes on to say in the very next sentence that, "This raises the initial question of what attributes an Indian group must possess in order to qualify as a tribe." In the footnote to this comment, he notes:

> Some commentators have suggested that such a question is problematic, both because indigenous groups should define themselves (rather than having a definition imposed from the outside by others) and because the organizational arrangements of indigenous peoples are too multifarious to admit of a single useful definition. The problem here is that the Indian Commerce Clause of the constitution refers to "Indian

> Tribes" that, if taken for a racial or ethnic group, would be unconstitutional. Under these circumstances, the courts and Congress will need to utilize some definition of "Indian Tribes" as that term is used in the Indian Commerce Clause to determine whether a given law violates equal protection. Whether that definition allows for one or many kinds of tribes, and whether it is proposed by indigenous groups themselves or by the federal government, the definition itself must exist in order to allow for the assessment of programs under present case law (specifically *Mancari* and *Adarand*).

Benjamin, *supra* at p. 574, fn. 157 [citations omitted].

Benjamin goes on to suggest one possible definition of "Indian tribe" might be the criteria laid out in 25 C.F.R., Part 83. But he argues that indigenous Hawaiians taken as a whole cannot meet this standard, because there is no single group to which all indigenous Hawaiians admit allegiance. *Id.* at p. 575. He goes on to suggest that "One seemingly possible way to avoid the problem of the absence of a Native Hawaiian entity would be to posit a series of Native Hawaiian tribes rather than one mass tribe." He concludes that, "there is reason to doubt, though, whether any native Hawaiian entity would meet the constitutional minima for an 'Indian Tribe[].'" *Id.*, at p. 580.

So basically, after all of his extensive research on the subject, Benjamin really does not know whether or not indigenous Hawaiians exist in tribal groups. If there is reason to doubt whether any indigenous Hawaiian group might meet any particular definition of an Indian tribe, then *a priori* it is also possible that one or more such groups *do* exist as an Indian tribe under one definition or another.

Although Petitioners assert that KA LAHUI does, indeed, meet the 25 C.F.R., §83.7 criteria and that they could prove it

if given the opportunity to go through the administrative process, the decision of the Court of Appeals below has denied them that opportunity. The decision of the Court of Appeals below has forever foreclosed the possibility of *any* indigenous Hawaiian group *ever* proving that it is, indeed, an Indian tribe under the administrative process laid out in 25 C.F.R., Part 83 and the criteria set forth in 25 C.F.R. §83.7.

B. The decision below deprives indigenous Hawaiians of the right of self-determination

Although the Court below concluded that it would be better for the question of tribal existence to be decided by the DOI "appl[ying] its expertise to parse through history and determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis," App., at p. 21, the Court undertook that process itself and decided against allowing them the opportunity to do that. App., pp. 14-20. Under the decision of the Court of Appeals below, indigenous Hawaiians' only hope for recognition of their sovereignty is legislative action by Congress. App., p. 21.

There is, indeed, legislation which has been pending in Congress for many years that would *create* a governing entity to represent the interests of indigenous Hawaiians. Senate Bill 344; H.R. 655. This bill has taken many forms over the years. The latest version is found at 150 Cong. Rec. S8916 (2004). While the various versions differ in particulars, they all have several things is common.

First, they all contain Congressional Findings that, if true, demonstrate that indigenous Hawaiians do, indeed, meet the criteria of 25 C.F.R., § 83.7 and have already been recognized by Congress as an Indian tribe. Therefore, there is no need for a new bill to establish that this relationship exists. It has already been done. In that respect, the bill is superfluous.

For example, some of the findings in the present version of

the bill are as follows:

(5) pursuant to the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), the United States set aside 203,500 acres of land to address the conditions of Native Hawaiians in the Federal territory that later became the State of Hawaii;

(6) by setting aside 203,500 acres of land for Native Hawaiian homesteads and farms, the Hawaiian Homes Commission Act assists the members of the Native Hawaiian community in maintaining distinct native settlements throughout the State of Hawaii;

(10) The Hawaiian Home Lands and other ceded lands provide an important foundation for the ability of the Native Hawaiian community to maintain the practice of Native Hawaiian culture, language, and traditions, and for the survival and economic self-sufficiency of the Native Hawaiian people;

(11) Native Hawaiians continue to maintain other distinctly native areas in Hawaii;

(15) despite the overthrow of the government of the Kingdom of Hawaii, Native Hawaiians have continued to maintain their separate identity as a distinct native community through cultural, social, and political institutions, and to give expression to their rights as native people to self-determination, self-governance, and economic self-sufficiency;

(17) Native Hawaiians are actively engaged in Native Hawaiian cultural practices, traditional agricultural methods, fishing and subsistence practices, maintenance of cultural use areas and sacred sites, protection of burial sites, and the exercise of their traditional rights to gather medicinal plants and herbs, and food sources.

(22) the United States has continually recognized and reaffirmed that—

(A) Native Hawaiians have a cultural, historic, and land-based link to the aboriginal, indigenous, native people who exercised sovereignty over the Hawaiian Islands;

(B) Native Hawaiians have never relinquished their claims to sovereignty or their sovereign lands;

(C) the United States extends services to Native Hawaiians because of their unique status as the indigenous, native people of a once-sovereign nation with whom the United States has a political and legal relationship; and

(D) the special trust relationship of American Indians, Alaska Natives, and Native Hawaiians to the United States arises out of their status as aboriginal, indigenous native people of the United States;

S-344, § 2.

Second, instead of recognizing existing indigenous groups, all of the versions of this bill provide for a new "Native Hawaiian governing entity" to be created under procedures established in the bill. The current version provides for Respondent to appoint a nine member commission, *Id.* § 7(b), to prepare a roll of "the names of the adult members of the Native Hawaiian community who elect to participate in the reorganization of the Native Hawaiian governing entity and are certified to be Native Hawaiian as defined in section 3(8) by the Commission." S-344, §7(c)(1)(A). The people enumerated on this roll would then elect an interim governing council. *Id.*, § 7(c)(2)(A)(iii), which would hold a referendum to ratify organic governing documents, *Id.*, § 7(c)(2)(B)(iii)(I), which governing documents are required to contain provisions listed in 7(c)(4)(A)(i) through (vii) of the bill.

The third thing that all versions of this bill have in common is a definition of "Native Hawaiian" that has no blood quantum or tribal affiliation requirement. *Id,* §3(8), in stark contrast to

the definition of "Indian" in the Indian Reorganization Act, at 25 U.S.C. § 479.

According to the 2000 U.S. Census figures, there were 402,000 people in the United States claiming "Native Hawaiian" ancestry. Grieco, Elizabeth M., *The Native Hawaiian and Other Pacific Islander Population: 2000*, U.S.Census Bureau, Census 2000 Brief C2KBR/1-14 (2001), p. 8. Of this figure, 141,000 claimed only "Native Hawaiian" ancestry. *Id.* Thus, the number of potential members of the new Native Hawaiian governing entity is many times greater than the number of native Hawaiians who have been awarded homesteads (6,800 according to S-344, §2(7)), or the number of members of KA LAHUI (between 12,000 and 24,000 according to Benjamin, *supra*, at 578, fn 173), the State Council of Hawaiian Homes Associations (between 27,000 and 30,000, *Id.*), The Provisional Government of the Independent Nation State of Hawaii (7,000, *Id.*), or the Hou Hawaiians (300 *Id.*).

Obviously, in any plebiscite to ratify organic governing documents for the new "Native Hawaiian governing entity," the votes of the members of the existing indigenous Hawaiian groups will be completely drowned by the tsunami wave of one sixty-fourth-part Hawaiians, *see Rice v Cayetano, supra, at p. 514,* and Hawaiians with one ancestor in five hundred, *see Id.* at 526 [BREYER, J. concurring].

Instead of recognizing the sovereignty of the indigenous Hawaiian people as it actually exists, the bill ignores and supercedes all existing indigenous Hawaiian groups and imposes a new representative government upon them, in all likelihood against their will, contrary to the fundamental concept of sovereignty and self-determination.

C. The decision below will have a major impact on the resolution of indigenous Hawaiian land claims.

In the opinion below, the Court seemed to be concerned that, if indigenous Hawaiian groups were granted recognition

under 25 C.F.R., Part 83, they would somehow be getting double benefits. The Court said, "[A]s members of a newly recognized Indian tribe or tribes, native Hawaiians would be entitled to the special rights and privileges granted to native Hawaiians *and* to those accorded to American Indians." App., p. A-20.

The rights of American Indians under the Indian Reorganization Act and the Indian Self-Determination Act, that indigenous Hawaiians do not have is the right to hold title to their own lands and provide for their own welfare.

Under Sections 5(b) and 5(d) of the Hawaii Admission Act, 73 Stat 4, P.L. 86-3, the United States ceded nearly all of the public land in Hawaii to the State except for military bases, national parks and other land needed by the federal government. This was not consistent with the land grants given to the other states, which were given between 1 and 4 sections per township for school and other government purposes. *See Lassen v. Arizona Highway Dept.*, 385 U.S. 458, 463 (1967) , fn 7.

In exchange for this extraordinary generosity on the part of the United States government, the State of Hawaii accepted the trust provisions in Section 5(f) of the Admission Act for the betterment of the condition of native Hawaiians and the compact to administer the Hawaiian Homes Commission Act, in Section 4 . Eighty-four years after it was enacted and 46 years after the state agreed to administer HHCA, there are only 6,800 beneficiaries and their families living on Hawaiian Home Lands, while there are 18,000 still on the waiting list. S-344, §2(7).

Congress was very generous to native Hawaiians by setting aside 203,500 acres of land for homelands and imposing a trust on 1.4 million acres of public land and the income and proceeds therefrom, in part, for their benefit. Unfortunately, for native Hawaiians, in 1959, at the time of statehood, the policy of the United States government was termination of the federal-tribal

relationship. *See* Canby, William C. Jr., *American Indian Law*, West Group, (3rd ed. 1998), pp. 55-58.

By turning over their land to the state government, indigenous Hawaiians were effectively deprived of the benefit thereof. The state has managed to settle only 6,800 families of beneficiaries on the Home Lands. While 18,000 still remain on the waiting list, many others have died waiting or have not registered because of the futility of doing so.

If an indigenous Hawaiian group or groups could achieve recognition under Part 83, such group or groups would be in a position to negotiate with the State of Hawaii for the return of some of their land so that they could become self-sufficient and *not dependent* upon the state or federal government for their welfare. But the State does not want to negotiate with the existing indigenous Hawaiian groups.

The fourth thing that all versions of S-344 have in common is that they authorize and direct the new Native Hawaiian governing entity to represent "Native Hawaiians" in settling indigenous Hawaiian land claims. *See* S-344, § 8(b).

Thus, the decision in this case may have an effect on the identity of parties to the negotiations for the resolution of these claims.

D. **The decision of the Court below justifies discrimination against indigenous Hawaiians on a non-racial basis while discrimination in favor of indigenous Hawaiians has been held by this Court to be based on race**

The decision of the Court below holds that discrimination against groups of indigenous Hawaiians is not racial discrimination and is therefore subject to rational basis review under the Equal Protection component of the Fifth Amendment.

In *Rice v. Cayetano, supra*, this Court held that discrimination *in favor* of indigenous Hawaiians was racial and therefore prohibited by the Fifteenth Amendment. Under an

Equal Protection challenge such discrimination would have been subject to a strict scrutiny standard. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, (1995)

This case is important because it presents the unique situation where discrimination against an ethnic group is reviewed under a more lenient standard than discrimination in their favor.

CONCLUSION

Because this case may have a profound effect on the fundamental relationship between the United States of America and the indigenous Hawaiian people, as shown by the foregoing argument and authorities, Petitioners respectfully request that this Honorable Court grant certiorari to review the judgment of the Court of Appeals. The indigenous Hawaiian people should not be denied the opportunity to at least make their case through the administrative process for sovereignty and the right of self-determination without a full review by this Court. This Court is their only hope against the political weight of 400,000 "Native Hawaiians" and the State of Hawaii.

Dated: Honolulu, Hawaii, January 25, 2005.

Respectfully submitted,
Walter R. Schoettle
Emmett E. Lee Loy
Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Patrick L. KAHAWAIOLAA; Virgil C. Day; Samuel L. Kealoha, Jr.; Josiah L. Hoohuli; Ka Lahui Hawai'i, Plaintiffs-Appellants, v. Gale A. NORTON, in her capacity as Secretary of the Department of the Interior of the United States of America, Defendant-Appellee.

No. 02-17239. D.C. No. CV-01-00817ACK OPINION

Appeal from the United States District Court for the District of Hawaii Alan C. Kay, District Judge

Argued November 7, 2003. Submitted October 27, 2004. Filed October 27, 2004

Before: James R. Browning, Stephen Reinhardt, and Sidney R. Thomas, Circuit Judges

[Page 1272]

Walter R. Schoettle and Emmett E. Lee Loy, Honolulu, HI, for the appellants.

Elizabeth A. Peterson, Ellen J. Durkee, Environment & Natural Resources Division, Jeffery Bossert Clark, Deputy Assistant Attorney General, Thomas L. Sansonetti, Assistant Attorney General, Department of Justice, Washington, D.C.; R. Michael Burke, Assistant United States Attorney and Edward H. Kubo, Jr., United States Attorney, Honolulu, HI, for the appellee.

OPINION

THOMAS, Circuit Judge:

In this appeal, we consider whether the exclusion of native Hawaiians from the Department of Interior's regulations acknowledging the federally recognized status of Indian tribes comprises discrimination in violation of the Equal Protection component to the Fifth Amendment's Due Process Clause. We have jurisdiction to determine whether the regulations are unconstitutional, and we conclude that they do not violate the Fifth Amendment under rational basis scrutiny.

I

Despite the importance of the inquiry, the United States has struggled to find an adequate definition of an Indian tribe. There is no universally recognized legal definition of the phrase, and no single federal statute defining it for all purposes. Felix S. Cohen, *Federal Indian Law* 3 (1982). As a general matter, the Supreme Court has described a tribe as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States*, 180 U.S. 261, 266, 36 Ct.Cl. 577, 21 S.Ct. 358, 45 L.Ed. 521 (1901).

The significance of the question is immediately apparent from the text of the Indian Commerce Clause of the United States Constitution, which gives Congress power "[t]o regulate Commerce . . . with the Indian *Tribes*." U.S. Const., Art. I, § 8, cl. 3. (emphasis added). Much of the theory that underpins Indian law is that the Indian tribes possessed certain sovereign rights based on their existence as distinct political entities exercising authority over [Page 1273] their members prior to the incorporation of their territory into the United States, *United States v. Wheeler*, 435 U.S. 313, 322, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); thus, "tribes retain whatever inherent sovereignty they had as the original inhabitants of this continent to the extent that sovereignty has not been removed by Congress." *Montana v. Gilham*, 133 F.3d 1133, 1137 (9th Cir. 1998).

Despite this general recognition of inherent sovereignty (and, perhaps, the irony), as far as the federal government is

concerned, an American Indian tribe does not exist as a legal entity unless the federal government decides that it exists.[1] Federal recognition affords important rights and protections to Indian tribes, including limited sovereign immunity, powers of self-government, the right to control the lands held in trust for them by the federal government, and the right to apply for a number of federal services. "Federal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity." William C. Canby, Jr., *American Indian Law in a Nutshell* 4 (4th ed. 2004).

One of the more important periods in federal recognition of Indian Tribes commenced with the passage of the Indian Reorganization Act in 1934, 25 U.S.C. § 461 et seq., which was intended in part to permit the tribes to set up legal structures designed to aid in self-government. To organize as an Indian tribe, a group would need to adopt an appropriate constitution and bylaws, ratified by a majority vote of the adult members of the tribe. In addition, the organization was required to be approved by the Secretary of the Department of Interior. See 25 U.S.C. §§ 476, 477.[2] As a result of this process, ninety-nine tribes were organized; ninety-six were excluded. Alva C.

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[1] This is not to say, obviously, that non-federally recognized tribes do not exist, or do not possess rights. However, as a general matter, absent federal recognition, tribes do not enjoy the same status, rights, and privileges accorded federally recognized tribes. *See, e.g.*, 25 C.F.R. § 83.2.

[2] In connection with the tribal reorganization established under the Indian Reorganization Act, the Department of Interior developed five considerations in determining whether a group constituted a tribe: (1) That the group has had treaty relations with the United States; (2) That the group has been denominated a tribe by act of Congress or executive order; (3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe; (4) That the group has been treated as a tribe or band by other Indian tribes; and (5) That the group has exercised political authority over its members, through a tribal council or other governmental forms. Cohen, supra, at 13.

Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. Pa. L.Rev. 1827, 1831 (2003).

Thus, prior to the late 1970's, the federal government recognized American Indian tribes on a case-by-case basis. See 59 Fed.Reg. 9280 (1994); *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 57 (2d Cir. 1994). In 1975, Congress established the American Indian Policy Review Commission to survey the current status of Native Americans. The Commission highlighted a number of inconsistencies in the Department of Interior tribal recognition process and special problems that existed with non-recognized tribes. As a result, in 1978, the Department of Interior exercised its delegated authority and promulgated regulations establishing a uniform procedure for "acknowledging" American Indian Tribes. 25 C.F.R. § 83.1 et seq. Acknowledgment under these regulations is a prerequisite for certain federal [Page1274] services and benefits, entitling tribes "to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States. . . ." 25 C.F.R. § 83.2.

Pursuant to the acknowledgment regulations, the Department of Interior reviews an application for recognition to determine whether the tribe can meet an extensive list of mandatory criteria: (a) the group has been identified from historical times to the present, on a substantially continuous basis, as Indian; (b) "a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present"; (c) the group "has maintained political influence or other authority over its members as an autonomous entity from historical times until the present"; (d) the group has a governing document; (e) the group has lists of members demonstrating their descent from a tribe that existed historically; (f) most of the members are not members of any other acknowledged Indian tribe; (g) the group's status as a tribe is not precluded by congressional

legislation. 25 C.F.R. § 83.7. The Department of Interior applies its expertise to this determination and has established the Branch of Acknowledgment and Research which staffs historians and anthropologists to determine whether groups seeking recognition "actually constitute Indian tribes and presumably to determine which tribes have previously obtained federal recognition." *James v. United States Dep't of Health and Human Servs.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987) (citing 25 C.F.R. § 83.6(b)); see also 25 C.F.R. § 83.11(e)(8). Thus, through its broad delegation and acknowledgment regulations, the Department of Interior has assumed much of the responsibility for determining which tribes have met the requirements to be acknowledged as a tribe with a government-to-government relationship with the United States.

However, by their terms, the regulations are applicable "only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department." 25 C.F.R. 83.3(a). The regulations define the "continental United States" as the "contiguous 48 states and Alaska." 25 C.F.R. 83.1. This geographic limitation means that native Hawaiians are excluded from eligibility to petition for tribal recognition under the regulations. Bluntly put, the Department of Interior was hanging out a sign that said: "No Hawaiians need apply."

It is this geographic limitation that is subject of this suit. Plaintiffs, who are native Hawaiians or native Hawaiian groups as defined by the Hawaiian Homes Commission Act, 42 Stat. 108, brought the present action seeking the right to apply for federal acknowledgment as an Indian tribe or tribes pursuant to 25 C.F.R., Part 83. Plaintiffs filed a complaint in the federal district of Hawaii alleging that by excluding native Hawaiians from the regulatory tribal acknowledgment process, the federal regulations exclude native Hawaiians from the benefits and protections of the Indian Reorganization Act, 25 U.S.C. § 461 et seq., and Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 et seq., and that such exclusion is

unconstitutional racial discrimination in violation of Plaintiffs' equal protection rights. The complaint sought declaratory and injunctive relief: a declaratory judgment that 25 C.F.R. §§ 83.1 and 83.3 amount to unconstitutional racial discrimination in violation of the Fifth Amendment, and a permanent injunction "enjoining and restraining Defendant, and her agents . . . from administering 25 [Page 1275] C.F.R., Part 83 and the Indian Reorganization Act . . . and the Indian Self-Determination Act . . . in a manner that excludes indigenous Hawaiians from the benefits and protection thereunder."

The Department of Interior filed a motion to dismiss for failure to state a claim, which the district court granted. The district court reasoned that the "requested relief necessarily involves the Court in deciding whether the [Department of Interior], and Congress, have inappropriately excluded Native Hawaiians from tribal recognition." *Kahawaiolaa v. Norton,* 222 F.Supp.2d 1213, 1222 (D.Haw. 2002). Thus, the court found that "Plaintiffs' case raises a nonjusticiable political question because their challenge to the regulations surrounding tribal recognition involves matters that have been constitutionally committed to the other branches; and resolution by the Court would show a lack of respect due to the coordinate branches." *Id.* at 1219.

The district court alternatively held that because Congress has not entered into a government-to-government relationship with native Hawaiians, the Department of Interior had a rational basis to exclude native Hawaiians from the acknowledgment regulations and there was no equal protection violation. The court thus granted the Department of Interior's motion to dismiss and denied Plaintiffs' motion for summary judgment. *Id.* at 1223 & n. 14. The Plaintiffs timely appealed. We review the dismissal for failure to state a claim on which relief can be granted de novo. *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003).

II

At the onset, we must decide whether the issue before us is justiciable or whether, as the district court determined, the political question doctrine precludes our consideration of the merits. We conclude it does not.

As Chief Justice Marshall observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." In *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court examined the political question doctrine and established the contours of the inquiry:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S.Ct. 691.

The Supreme Court observed that: "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'" *Id.*

If the question before us were whether a remedy would lie against Congress to compel tribal recognition, the answer would be readily apparent. There is a "textually [Page 1276] demon-

strable constitutional commitment" to Congress "[t]o regulate Commerce . . . with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. Thus, the Supreme Court has often declared that, based on this and other provisions of the Constitution, "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). Pursuant to this plenary power, "Congress has the power, both directly and by delegation to the President, to establish the criteria for recognizing a tribe." *Miami Nation v. United States Dep't of Interior*, 255 F.3d 342, 345 (7th Cir. 2001). Thus, it is quite correct to say that a suit that sought to direct Congress to federally recognize an Indian tribe would be non-justiciable as a political question. *see United States v. Sandoval*, 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107 (1913) (explaining that the "questions whether, to what extent, and for what time [Indian groups] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."). For the same reason, as courts have recognized, "'the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.'" *Miami Nation*, 255 F.3d at 347 (quoting William C. Canby, Jr., *American Indian Law in a Nutshell* 5 (3d ed. 1998)).

However, that is not what the Plaintiffs seek in this legal action. Rather, they seek to invalidate a provision that forbids them from applying to the Department of Interior for recognition under the same regulatory criteria applied to indigenous peoples in other states. That presents a different question and a different issue for application of the political question doctrine.

As Judge Posner explained in *Miami Nation*, when the executive branch has "canalize[d] the discretion of its subordinate officials by means of regulations that require them to base

recognition of Indian tribes on the kinds of determination, legal or factual, that courts routinely make," then "the executive brings the tribal recognition process within the scope of the Administrative Procedure Act." 255 F.3d at 348. Thus, the decisions of the Department of Interior in recognizing Indian tribes through the acknowledgment process are subject to normal judicial review under the Administrative Procedure Act. *Id.*

That constitutional questions concerning the administration of the acknowledgment regulations are justiciable was made abundantly clear in *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995), in which we held that the Department of Interior's acknowledgment procedures were subject to the Due Process Clause. *Id.* at 1274-75.

Here, Plaintiffs request a declaration that the portions of 25 C.F.R. § 83.1 and 83.3 which preclude Hawaiians from acknowledgment are unconstitutional. As established in *Baker*, "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker* further emphasized the "necessity for discriminating inquiry into the *precise facts and posture* of the particular case. . . ." 369 U.S. at 217, 82 S.Ct. 691 (emphasis added).

Indeed, the political question doctrine does not bar adjudication of a facial constitutional challenge even though Congress has plenary authority, and the executive has broad delegation, over Indian affairs. [Page 1277] In *INS v. Chadha*, the Supreme Court held that the Constitution provided a legal basis for the court to resolve issues related to aliens even though Congress has plenary authority over aliens. 462 U.S. 919, 940-43, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). The Court noted that, although Congress' plenary authority is not open to question, whether Congress constitutionally implemented that authority may be a proper challenge. The Court continued to explain that while the controversy may be termed "political," the "presence of constitutional issues with significant political overtones does

not automatically invoke the political question doctrine." Id. at 942-43, 103 S.Ct. 2764. This rationale has been inferred with regard to Congress' plenary authority over tribal recognition. *See Sandoval*, 231 U.S. at 46, 34 S.Ct. 1 (concluding that while tribal recognition is a question for the political branches "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe.")

Because Plaintiffs raise a facial constitutional challenge to the regulations which does not "demand" or even imply recognition of native Hawaiians, the federal courts are particularly suited to address their constitutional challenge as to the limitations of the regulation. The question is justiciable and our consideration of it is not precluded by the political question doctrine.[3]

III

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[3] The Department of Interior also urges that this case is not justiciable under the political question doctrine because the record does not demonstrate that Congress has established a government-to-government relationship with any native Hawaiian tribe. This reasoning is entirely circular and contradictory. It asks us to decide the ultimate question of whether Congress has established such a relationship, then declare the question we have just decided as non-justiciable. Further, the application of the regulations at issue is designed to decide that question, subject to judicial review. 25 C.F.R. § 83.2. The government's argument also begs the constitutional question at hand, which is whether the regulations prohibiting indigenous native Hawaiians from applying for recognition violate the Fifth Amendment — not whether such groups are entitled to recognition. Finally, the issue is far from clear. A detailed factual analysis of the treaties, legislation and congressional findings applicable to native Hawaiians requires a more detailed review than we are equipped to handle on the present record. Indeed, the Supreme Court even noted that whether Congress may treat native Hawaiians as Indian tribes "is a matter of some dispute." *Rice v. Cayetano*, 528 U.S. 495, 518, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000).

In determining whether the regulation violates the Fifth Amendment, we must first determine the level of scrutiny to apply. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Laws alleged to violate the constitutional guarantee of equal protection are generally subject to one of three levels of "scrutiny" by courts: strict scrutiny, intermediate scrutiny, or rational basis review. *Tucson Woman's Clinic v. Eden*, Nos. 02-17375, 02-17381, 02-17382, 2004 WL 1873707, *7 (9th Cir. Aug.23, 2004). Strict scrutiny is applied when the classification is made on "suspect" grounds such as race, ancestry, alienage, or categorizations impinging upon fundamental rights such as privacy, marriage, voting, travel, and freedom of association. *Hoffman v. United States*, 767 F.2d 1431, 1434-35 (9th Cir. 1985). Laws are subject to intermediate scrutiny when they discriminate based on certain other suspect classifications, such as gender. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). When no suspect class is involved and no fundamental right is burdened, we apply a rational basis test to determine the [Page 1278] legitimacy of the classifications. *Olagues v. Russoniello*, 770 F.2d 791, 802 (9th Cir. 1985). The conclusion of whether a governmental act is subject to strict scrutiny or rational basis examination is important, as it often determines the outcome of the inquiry. *United States v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995) (Boochever, J. concurring).

The Plaintiffs argue that the classification is racially based and therefore subject to strict scrutiny. The Department of Interior contends that the classification is politically based and therefore reviewed under the rational basis test. We conclude that the regulation should be examined under rational basis review.

Historically, the formal relationship between the United States and American Indian tribes has been political, rather than race-based. The Indian Commerce Clause speaks to regulation of commerce with tribes, not individuals. U.S. Const., Art. I, §

8, cl. 3. Indeed, historical evidence suggests that "the Founders regarded Indians as distinct nations to be dealt with diplomatically and at arm's length." Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L.Rev. 1069, 1080 (2004).

In *Morton v. Mancari*, the Supreme Court explained that employment preferences for certain qualified Indians in the Bureau of Indian Affairs, did not constitute "racial discrimination," or even a "racial" preference. 417 U.S. 535, 553-54, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). This is because "the preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." Id. at 554, 94 S.Ct. 2474. Thus, as long as special treatment is "tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed." Id. at 555, 94 S.Ct. 2474.

The Supreme Court subsequently explained:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal government's relations with Indians.

United States v. Antelope, 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977). The Court further stated that federal regulation of Indian tribes "is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians'" Id. at 646, 97 S.Ct. 1395 (quoting *Mancari*, 417 U.S. at 553, 94 S.Ct. 2474, internal quotations omitted).

Plaintiffs argue that *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), require application of strict scrutiny

because native Hawaiians comprise a racial group against which the Department of Interior's regulations discriminate. Indeed, *Adarand* held that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." 515 U.S. at 227, 115 S.Ct. 2097.

In the context of a Fifteenth Amendment challenge to Hawaii's voting scheme for trustees of a state agency, *Rice* concluded that a statutory definition of native Hawaiian "used ancestry as a racial definition and for a racial purpose." 528 U.S. at 515, 120 S.Ct. 1044. In reaching this conclusion, Rice explained that although [Page 1279] native Hawaiians derived from diverse backgrounds, they were isolated from migration, and shared common physical characteristics and culture. As such, the state's definition of native Hawaiian in its voting scheme singled out an identifiable class of persons based on ancestry and ethnic characteristics. *Id.* at 514-15, 120 S.Ct. 1044.

The racial classification of native Hawaiians in Rice does not apply to this case. In fact, *Rice* explicitly reaffirmed and distinguished the political, rather than racial, treatment of Indian tribes as explained in *Mancari*. The issue did not concern recognition of quasi-sovereign tribes. Instead, *Rice* concerned elections of the State of Hawaii to which the Fifteenth Amendment applied, and application of *Mancari* to such facts would "permit a State, by racial classification, to fence out whole classes of its citizens. . . ." 528 U.S. at 522, 120 S.Ct. 1044. In short, at its core, *Rice* concerned the rights of individuals, not the legal relationship between political entities.

Rice does not bear on the instant case because Plaintiffs' claim challenges the very regulations that acknowledge the quasi-sovereign, government-to-government relationship between the United States and Indian tribes. While Congress may not authorize special treatment for a class of tribal Indians in a state election, Congress certainly has the authority to single out "a constituency of tribal Indians" in legislation "dealing with Indian tribes and reservations." *Rice*, 528 U.S. at 519-20,

120 S.Ct. 1044.

As Rice illustrates, an "Indian tribe" may be classified as a "racial group" in particular instances — certainly continental tribes can identify a common culture and ethnicity. We reject the notion that distinctions based on Indian or tribal status can never be racial classifications subject to strict scrutiny. The preference in *Mancari* "[was] not directed towards a 'racial' group consisting of 'Indians'; instead, it applie[d] only to members of 'federally recognized' tribes . . . In this sense, the preference is political rather than racial in nature." *Mancari*, 417 U.S. at 543 n. 24, 94 S.Ct. 2474. Government discrimination against Indians based on race or national origin and not on membership or non-membership in tribal groups can be race discrimination subject to strict scrutiny. *See Adarand*, 515 U.S. at 227, 115 S.Ct. 2097. However, the recognition of Indian tribes remains a political, rather than racial determination. Recognition of political entities, unlike classifications made on the basis of race or national origin are not subject to heightened scrutiny. Consequently, we apply rational basis review to the Department of Interior regulations.[4]

IV

Rational basis review, as we have oft-observed, is "highly deferential." *United States v. Hancock*, 231 F.3d 557, 566 (9th Cir. 2000). If the classification at issue does not involve fundamental rights or suspect classes, it must be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v.*

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[4] We are also quite mindful that the application of strict scrutiny in this instance might have profound consequences in other contexts. As in Mancari, North American Indian tribes have often urged that a rational basis examination should apply to programs that benefit tribes. Further, there are numerous statutes in Hawaii that provide special benefits to native Hawaiians. See Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale. L.J. 537, 540 (1996).

Doe, 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). In defending a [Page 1280] statute on rational-basis review, the government "has no obligation to produce evidence to sustain the rationality of a statutory classification"; rather, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* at 320, 113 S.Ct. 2637 (internal quotations and citations omitted).

As the Supreme Court has stated, under rational basis review:

> the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11-12, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (citations omitted).

At first blush, even under rational basis review, a geographic exception to an otherwise uniform federal regulation appears problematic. If, for example, the regulation had drawn a line at the Yellow-stone River in Montana and provided that similarly situated tribes north of the river were eligible to apply for recognition, but those south were not, it would be difficult to justify such a classification. However, the origin of the acknowledgment regulations and the unique history of Hawaii provide sufficient basis to sustain the regulation against an equal protection challenge under the highly deferential rational basis review.

As we have discussed, the origin of the acknowledgment regulations is found in the Indian Reorganization Act, which repudiated the general policy of allotment whereby reservation lands were allotted to tribal members who could ultimately transfer such lands to nonmembers. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408,

436, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989); citing Cohen, supra, at 614 (explaining that major purposes of the Indian Reorganization Act included ending allotment and assisting tribes in restoring an adequate land base). The Indian Reorganization Act, however, specifically confined its geographic reach. It defined "Indian" as including:

> all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.

25 U.S.C. § 479.

Thus, by its terms, the Indian Reorganization Act did not include any native Hawaiian group. There were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii. Although Hawaii and Alaska were both United States territories in 1934, only Alaska was specifically included. *See* 25 U.S.C. § 473 ("The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16 (25 U.S.C.A. §§ 469, 470, 471, 472, 476) shall apply to the Territory of Alaska."). [Page 1281]

A similar distinction was made in the Indian Self-Determination and Education Assistance Act ("ISDEA"), 25 U.S.C. § 450 et seq., another statute upon which the Plaintiffs rely. Congress passed ISDEA to give Indian tribes greater control over their education programs. Cohen, supra, at 194; 25 U.S.C. § 450a(a). However, as with the Indian Reorganization Act, the ISDEA excludes Hawaiian Native Americans, defining an "Indian" as "a person who is a member of an Indian tribe,"

and an "Indian tribe" is "any tribe, band, nation or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 450b(d), (e). Thus, Congress has evidenced an intent to treat Hawaiian natives differently from other indigenous groups.[5]

In great part, the reason for this is inextricably entwined with the unique history of Hawaii and its relationship with the United States. In *Rice,* the Supreme Court had the opportunity to generally describe the origins and background of native Hawaiians. Relevant to our present discussion, the Court explained that the "usual assumption" is that the first Hawaiians were Tahitian Polynesians who settled the islands around A.D. 750. By the time England's Captain Cook visited the islands in 1778, the Hawaiian people had developed well-established traditions and customs, with a defined cultural and political structure. In 1810, the islands were united as one kingdom under Kamehameha I. *Rice*, 528 U.S. at 500-01, 120 S.Ct. 1044. While Hawaii's island geography developed a society of diverse ethnic backgrounds and cultures, it was isolated from migration for centuries, its indigenous inhabitants shared common

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[5] We recognize that the distinctions that we have drawn are between native Hawaiians as a whole and federally recognized Indian tribes, whereas the question that confronts us is whether native Hawaiians as a whole should be treated in a manner similar to non-federally recognized indigenous Indian groups that seek federal tribal status in the continental United States. We do not think that the difference between the two groups of native Americans domiciled in the continental United States is of legal significance for purposes of our opinion. The critical factor is the similarity of the geographic and historical circumstances of indigenous native American groups, federally recognized as Indian tribes or not, and the contrast between those circumstances and the geographic and historic circumstances of native Hawaiians as a whole.

physical characteristics, and by 1778 had developed a common culture. *Id.* at 514-15, 120 S.Ct. 1044.

European and American settlement of the region did not begin in earnest until 1820, and the west played an increasing economic and political role throughout the 1800s. *Rice*, 528 U.S. at 501, 120 S.Ct. 1044. From 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii and entered into treaties and conventions with Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887. Pub.L. No. 103-150, 107 Stat. 1510. Significantly for our purposes, in 1871 at a midpoint during this period, Congress passed legislation refusing to recognize tribes as nations with which the United States could make treaties. 25 U.S.C. § 71. Thus, and quite naturally, during this period, Congress viewed Hawaii as a separate kingdom and not as an organized tribe.

On January 14, 1893, John L. Stevens, the United States Minister to the Kingdom of Hawaii, conspired to overthrow the existing [Page 1282] government in Hawaii and positioned armed naval forces to effectuate his plan. On January 17, 1893, American and European settlers ousted Queen Liliukalani and proclaimed the establishment of a Provisional Government. Soon thereafter, Queen Liliukalani yielded her authority to the United States government. Pub.L. No. 103-150, 107 Stat. 1510.

In 1898, President McKinley signed the Newlands Resolution to annex the Hawaiian Islands as territory of the United States. Pursuant to this resolution, the Republic of Hawaii ceded all former public lands to the United States. In 1900, the Hawaiian Organic Act established the Territory of Hawaii, and asserted control over ceded lands. *Rice*, 528 U.S. at 505, 120 S.Ct. 1044 (citing 30 Stat. 750; Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159).

In 1921, Congress enacted the Hawaiian Homes Commission Act ("Commission Act"), 42 Stat. 108, which designated approximately 200,000 acres ("Hawaiian home lands") "for the welfare and rehabilitation of native Hawaiians."

Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216, 1218 (9th Cir. 1978). The Commission Act was "ostensibly designed to rehabilitate the declining indigenous Hawaiians by facilitating their access to farm and homestead lands." *Id.* However, when Hawaii was finally admitted to the Union in 1959[6] the Hawaii Admission Act, Pub.L. No. 86-3, 73 Stat. 5 (1959), transferred responsibility for the administration of the Hawaiian home lands to the state. Id. In short, the history of the indigenous Hawaiians, who were once subject to a government that was treated as a co-equal sovereign alongside the United States until the governance over internal affairs was entirely assumed by the United States, is fundamentally different from that of indigenous groups and federally recognized Indian tribes in the continental United States.

Furthermore, since becoming the 50th State, Congress has established a program of federal benefits and entitlements for native Hawaiians that is different from that afforded federally recognized Indian tribes in the contiguous United States and Alaska. Although native Hawaiians enjoy many of the "same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities" under certain statutes, 42 U.S.C. § 11701(19) (citing, *inter alia*, the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001, and the Native American Programs Act of 1974, 42 U.S.C. § 2991), Congress, because of the unique history of Hawaii, has excluded them from some statutes while enacting others that benefit native Hawaiians only. *See e.g.*, The Commission Act, 42 Stat. 108; The Native Hawaiian Education Act, 20 U.S.C. §§ 7511-7517; The Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. §§ 11701-11714. We find it significant that Congress has specifically included both native Hawaiians and members of American Indian tribes in certain privi-

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[6] The first Hawaii statehood bill was introduced in the 65th Congress in 1919. See Keaukaha-Panaewa, 588 F.2d at 1223 (quoting S.Rep. No. 80, 86th Cong., 1st Sess. (1959)).

lege-granting statutes while specifically excluding either native Hawaiians or tribal members from a number of others. As the Department of Interior points out, many statutes distinguish between native Hawaiians and members of Indian tribes. *See, e.g.*, 25 U.S.C. § 3001(6), (7), (10), (11), (12).

It is rational for Congress to provide different sets of entitlements — one governing native Hawaiians and another governing [Page 1283] members of American Indian tribes. It would also be rational for Congress to decide that native Hawaiians should be prohibited from applying for federal recognition. Otherwise, as members of a newly recognized Indian tribe or tribes, native Hawaiians would be entitled to the special rights and privileges granted to native Hawaiians *and* to those accorded to American Indians. Granting federal recognition to native Hawaiians as an Indian tribe or tribes would serve to blur the categorical distinction between the two groups, frustrate at least to some degree Congress' intent to treat the two groups differently, and allow native Hawaiians to obtain greater benefits than the members of all American Indian tribes.

There is also the question of whether native Hawaiians constitute one large tribe, perhaps retaining some form of internal governance by the Office of Hawaiian Affairs or the Hawaiian Homes Commission, or whether there are, in fact, several different tribal groups, such as the Hou Hawaiians. *See Price v. Hawaii*, 764 F.2d 623 (9th Cir. 1985); *see generally* Stuart, 106 Yale L.J. at 580-81. These questions are not easily resolved within the traditional federal recognition paradigm.

In short, the status of native Hawaiians as recognized tribes continues to raise "questions of considerable moment and difficulty," and is ultimately "a matter of some dispute." *Rice*, 528 U.S. at 518, 120 S.Ct. 1044. Congress' treatment and relationship with native Hawaiians is a veritable patchwork of legislation, findings, resolutions and historic treaties. Given this, the unique history of Hawaii, and the historical restrictions of the acknowledgment process to continental American Indian tribes, we conclude that the Department of Interior's classifica-

tion passes constitutional muster on rational basis review.

V

Although we conclude that the Department of Interior's exclusion of Hawaiians passes constitutional muster, we recognize that, in many ways, the result is less than satisfactory. We would have more confidence in the outcome if the Department of Interior had applied its expertise to parse through history and determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis. It would have been equally rational, if perhaps not more so, for the Department to have decided to undertake that inquiry in the first instance. However, under equal protection rational basis review, it is not for us "to judge the wisdom, fairness, or logic" of the choices made. *Heller*, 509 U.S. at 319, 113 S.Ct. 2637 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). Thus, in the end, we must commit this question to Congress to apply its wisdom in deciding whether or not native Hawaiians should be included among those eligible to apply for federal tribal recognition.[7]

We affirm the judgment of the district court.

AFFIRMED.

[Page 1284]

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[7] Given our resolution of the issues, it is unnecessary for us to reach any of the other issues urged by the parties.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

PATRICK L. KAHAWAIOLAA, et al., Plaintiffs, vs. GALE A. NORTON, in her capacity as Secretary of the Department of the Interior of the United States of America

Civ. No. 01–00817 ACK/BMK

Filed in the United States District Court, District of Hawaii
August 30, 2002
at 3 o'clock and 40 min p.m.
Walter A.Y.H. Chinn, Clerk

ORDER GRANTING DEFENDANTS MOTION TO DISMISS AND DENYING PLAINTIFFS' COUNTER-MOTION FOR SUMMARY JUDGMENT

BACKGROUND

This action arises out of an attempt by a group of Native Hawaiians ("Plaintiffs") to have certain regulations promulgated by the defendant Department of Interior ("DOI" or "Defendant") (the DOI is sued through DOI Secretary Gale A. Norton) declared unconstitutional and permanently enjoined. In particular, Plaintiffs object to the regulations at issue because the scope of such regulations exclude Native Hawaiians [West Page 1214] from the universe of indigenous groups that may become federally acknowledged as an "Indian tribe" with all the benefits with respect to that recognition.

Plaintiffs filed their suit on December 11, 2001. Defendant did not file an answer but instead filed a motion to dismiss on

March 15, 2002. Plaintiffs filed their opposition to Defendant's motion and filed a counter-motion for summary judgment on March 28, 2002. Defendant filed a reply to Plaintiffs' opposition and an objection to Plaintiffs' motion for summary judgment on April 9, 2002. The Court heard oral arguments on June 10, 2002. During the hearing, the Court instructed the parties to file supplemental papers regarding certain aspects of the procedural background of the case that had not been briefed by the parties.[1] The parties filed their supplemental briefs on July 17, 2002 and replies on August 1, 2002.

STATUTORY AND REGULATORY BACKGROUND

Plaintiffs' suit implicates the Indian Reorganization Act ("IRA"), the Indian Self-Determination and Education Act ("ISDEA") and the federal acknowledgment regulations. The Court reviews each in turn.

I. The Indian Reorganization Act

The IRA was passed by Congress in 1934 with "[t]he overriding purpose . . . to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *The Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152-154, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); see 25 U.S.S 461 et. seq. The IRA defines "Indian" as:

> The term "Indian" as used in [the IRA] shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present

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[1] In particular, the Court queried whether Plaintiffs had in fact filed with the DOI for federal acknowledgement; and if not, whether Plaintiffs had a duty under the facts of this case to file with the DOI so as to exhaust their administrative remedies; and whether the regulations promulgated by the DOI at issue are legislative or interpretive in nature.

> boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in said sections shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in said sections shall be construed to refer to Indians who have attained the age of twenty-one years.

25 U.S.C. § 479. Additionally, the IRA "shall not apply to any of the Territories, colonies, or insular possessions of the United States." The Court notes that when the IRA was passed in 1934, the State of Hawaii was then a territory of the United States. Hawaii was admitted as a state in 1959.

II. The Indian Self-Determination and Education Act

The ISDEA was passed in 1974 to further strengthen tribal government and interests. 25 U.S.C. § 450 et. seq. Congress stated the following policy:

> The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring [West Page 1215] maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

25 U.S.C. § 450a(a). The benefits that proceed from the ISDEA are available to "Indians" who are defined as "a person who is a member of an Indian tribe;" and an "Indian tribe" is further defined as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act . . . which

is recognized as eligible[2] for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 450b(d), (e).

III. The Federal Acknowledgment Process

Congress has delegated to the DOI the authority to adopt regulations to administer Indian affairs and to clarify departmental authority by regulation under 25 U.S.C. § 2, 9. *See James v. United States Dep't of Health and Human Services*, 824 F.2d 1132, 1137-38 (D.C.Cir. 1987). Pursuant to this authority, the DOI has adopted comprehensive regulations that govern its decisions concerning tribal status set out in 25 C.F.R Part 83 (the "acknowledgment regulations"). This part established procedures by which the DOI acknowledges that certain Indian groups exist as "tribes." *Id.* § 83.2.

The a acknowledgment regulations provide that "[a]cknowledgment of tribal existence by the [DOI] is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." Id. The regulations apply only to "those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." 25 C.F.R. § 83.3 (a).

STANDARDS OF REVIEW

I. MOTION FOR SUMMARY JUDGMENT

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R.Civ.P. 56(c). The

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[2] The parties agree that in order for Native Hawaiians to benefit under the ISDEA, they must be recognized as eligible as a tribe under the acknowledgment regulations.

standard for summary adjudication is the same. *See State of Cal. v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998). One of the principal purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The United States Supreme Court has declared that summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to his case where that party will bear the burden of proof of that essential element at trial. *See id.* at 322, 106 S.Ct. 2548. "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact [citations omitted], the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment." *T.W. Elec.* [West Page 1216] *Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Rather, Rule 56(e) requires that the nonmoving party set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial. See id. at 630. At least some "significant probative evidence tending to support the complaint" must be produced. *Id.* Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *See British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Anderson*, 477 U.S. at 250-51, 106 S.Ct. 2505.

The Ninth Circuit has established that "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987). Moreover, the United States Supreme Court has stated that "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Indeed, "if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468 (emphasis in original) (*citing Matsushita*, 475 U.S. at 587, 106 S.Ct 1348). Of course, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. *See T.W.Elec.Serv.*, 809 F.2d at 630-31.

II. Motion to Dismiss

Under Rule 12(b)(6), in ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, this Court must accept as true the allegations contained in the complaint and view them in a light most favorable to the claimant. *Sheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 334 (9th Cir. 1990); *Shah v. County of Los Angeles*, 797 F.2d 743, 745 (9th Cir. 1986). Thus, the complaint must stand unless it appears beyond doubt that the claimant has alleged no facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory.

Balistreri, 901 F.2d at 699; *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984).

A motion under Rule 12(b)(6) should also be granted if an affirmative defense or other bar to relief is apparent from the face of the claim, such as lack of jurisdiction or the statute of limitations. 2A J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice, ¶ 12.07 at 12-68 to 12-69 (2d ed. 1991 & supp. 1191-92) (citing *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)) (emphasis added). [West Page 1217]

DISCUSSION

Plaintiffs' central challenge is twofold: to Congress' decision as to which groups are eligible to be dealt with on a government-to-government basis, *e.g.*, as a federally recognized tribe; and to the DOI's role in implementing that congressional policy through the acknowledgment regulations.

A. The Parties' Contentions

Plaintiffs' complaint is premised on the notion that the exclusion of Native Hawaiians flows from unlawful racial discrimination. The gist of Plaintiffs' challenge is as follows: they seek benefits that flow from the ISDEA and the IRA. The ISDEA defines those tribes that are eligible for benefits as those who are "recognized as eligible . . . by the United States." 25 U.S.C. § 450b. The IRA's benefits likewise are directed towards Indians, which are defined as "all persons of Indian descent who are members of any recognized tribe now under federal jurisdiction and shall further include all other persons of one-half or more Indian blood. . . ." 25 U.S.C. § 479. Plaintiffs contend that neither of these definitions necessarily exclude Native Hawaiians from the universe of potentially recognizable tribes. Instead, Plaintiffs argue that the acknowledgment regulations except Native Hawaiians from the opportunity to become acknowledged as an Indian Tribe because the regulations limit the potential groups to those within the continental

United States[3] and certain Alaskan native groups already acknowledged as tribes. 25 C.F.R. § 83.1, 83.3. Thus, unlike the typical challenge in this area where an aggrieved group of Indians seeks recourse in federal court for the DOI's refusal to acknowledge such group as a "tribe;" this matter presents the highly unusual question of whether the DOI's regulations, which result in the disallowance of Native Hawaiian claims of tribal status, are legal. The challenge is not to the DOI's application of its regulations[4] but rather a facial challenge to a portion of them, or more particularly, to their geographic exclusion of the State of Hawaii.[5]

Conversely, Defendant contends that the acknowledgment regulations merely implement Congress' decision to not include Native Hawaiians as an "Indian tribe." Defendant maintains that the Court lacks subject matter jurisdiction over this matter because it involves the political question of whether Plaintiffs, as Native Hawaiians, are entitled to a government-to-government relationship with the United States. Alternatively, Defendant urges that should the Court consider Plaintiffs' claim, it should dismiss Plaintiffs' complaint because the acknowledgment regulations do not deprive Plaintiffs of equal protection under the Fifth Amendment and/or Plaintiffs' action, as a facial challenge to the acknowledgment regulations, is barred by the statute of limitations. Defendant objects to Plaintiffs' summary judgment motion because Plaintiffs failed to conform their motion to the requirements of Local Rule

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[3] The acknowledgment regulations define "continental United States" as the contiguous 48 states and Alaska. 25 C.F.R. § 83.1.

[4] The parties informed the Court through the supplemental briefing that Plaintiffs have not applied to the DOI for recognition as an Indian tribe.

[5] On this basis, the parties agree that Plaintiffs were not under the obligation to exhaust their administrative remedies before commencing this suit.

56.1(a) (failing to file a concise statement of facts). Also, Defendant contends that the matter is not ripe for summary judgment.

Defendant primarily argues that Plaintiffs' complaint is not a matter of equal [West Page 1218] protection but rather is a dispute that centers on the absence of any decision of Congress to deal with Native Hawaiians on a government-to-government basis (e.g. as a federal recognized Indian tribe).[6] Defendant urges the Court to find that this case raises a political question because it involves the decision not to recognize Native Hawaiians as a potential tribe. Because the DOI primarily maintains that this Court lacks jurisdiction under the political question doctrine, the Court addresses it first.

B. Legal Standard for Political Questions

Federal courts are courts of limited jurisdiction. *Nat'l Indian Youth Council Intermountain Indian Sch. v. Bruce*, 485 F.2d 97, 99 (10th Cir. 1973). No presumptions of federal jurisdiction exist. *Id.* The political question doctrine was developed by the landmark case of *Baker v. Carr* as follows:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional

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[6] Defendant's arguments clearly center upon Congress', rather than the Executive's, prerogative with respect to recognizing Indian tribes. Other cases have recognized that the Executive may have authority, independent of congressional grant, to recognize Indian tribes. *See Miami Nation v. U.S. Dep't of Interior*, 235 F.3d 342, 345 (7th Cir. 2001) (Judge Posner offering that "nor is it clear that [the acknowledgment regulations] has to be authorized by Congress."). in other words, Defendant does not argue that the regulations as written are a manifestation of Executive prerogative, but rather dependent on the instructions of Congress.

> commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 218, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *see also* CHARLES ALAN WRIGHT, LAW OF FEDERAL, COURTS 84-91 (5th Ed. 1994).

The decision to recognize (or not recognize) an Indian tribe is generally regarded as a political question. *See e.g., Baker*, 369 U.S. at 215-17, 82 S.Ct. 691 (identifying cases questioning the status of Indian tribes as representative of political controversies inappropriate for judicial resolution); *Miami Nation*, 255 F.3d at 347 (reasoning that question of whether a tribe constitutes a nation with which the United States might establish government-to-government relations raises political question concerns); *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition").

The prevalence of the political question doctrine within Indian affairs stems, in part, from the constitutional and historical placement of such matters in the exclusive domain of the legislative and executive branches. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) (citations [West Page 1219] omitted) ("Congress possesses plenary power over Indian affairs. including the power to modify or eliminate tribal rights."); Art. I, Section 8, cl. 3. In turn, Congress has delegated management and regula-

tion of Indian affairs to the Executive Branch. 25 U.S.C. § 2, 9, 43 U.S.C. § 1457; *Zarr v. Barlow*, 800 F.2d 1484, 1489 (9th Cir. 1986); *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1503 (D.C.Cir. 1997); *Miami Nation v. Babbitt*, 887 F. Supp. at 1166-67; *United Shawnee Indians v. United States*, 253 F.3d 543, 549 (10th Cir. 2001). Courts exercise deference over such decisions based upon this broad congressional power. *Miami Nation*, 255 F.3d at 345; *Western Shoshone*, 1 F.3d at 1057. Thus the general view is that Congress has the power, both directly and by delegation to the President, to establish the criteria[7] for recognizing a tribe.[8] *Miami Nation*, 255 F.3d at 345.

C. Application of the Legal Standard

Considering the legal framework in evaluating political questions, the Court finds that Plaintiffs' case raises a

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[7] The difficulty with respect to determining whether Congress or the Executive Branch had recognized a group as a "tribe" was substantially reduced in 1978 when the DOI promulgated the acknowledgment regulations, which govern the federal acknowledgment of Indian tribes. *See generally* 25 C.F.R. Part 83.

[8] In *Miami Nation*, Judge Posner addressed the logic of such an understanding of the inter-branch power sharing with respect to acknowledgment of Indian Tribes by noting:

> This makes practical sense [that Congress is assumed to be primary in power over recognizing Indian Tribes]. Congress has passed a number of statutes granting various benefits and immunities to Indian tribes, provided they are recognized by the federal government. e.g. [ISDEA]; Indian Financing Act of 1975. Naturally and legitimately, Congress is concerned, which groups of Indians are given the status of tribes. But the analogy to [executive] recognition of foreign governments has prevailed to the extent that Congress has delegated to the executive branch the power of recognition of Indian tribes without setting forth any criteria to guide the exercise of that power.

Id. (internal citations omitted).

nonjusticiable political question because their challenge to the regulations surrounding tribal recognition involves matters that have been constitutionally committed to the other branches; and resolution by the Court would show a lack of respect due to the coordinate branches. As noted by the Seventh Circuit in Miami Nation, cases such as this one that essentially seek tribal recognition also implicate that aspect of the political question doctrine in which the initial policy determination is of a kind that requires nonjudicial discretion. 255 F.3d at 347.

Although Plaintiffs style their claims as arising under Equal Protection, Plaintiffs' principal dispute is twofold: to Congress' determination as to which groups are eligible to be dealt with on a government-to-government basis, *e.g.*, as a federally recognized tribe; and the DOI's role in executing that congressional policy through the acknowledgment regulations. Adjudication of Plaintiffs' claim would directly place the Court in the shoes of Congress and the Executive Branch in determining whether Native Hawaiians should be recognized and acknowledged as an Indian tribe.

Congress has not yet decided that it will deal with Native Hawaiians groups as political entities on a government-to-government basis.[9] Indeed, Plaintiffs have not [West

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[9] Professor Cohen characterized the status of Native Hawaiians under federal Indian law in his treatise as follows:

> Although Native Hawaiians are not ethnically classified as Indians, they are people indigenous to the United States. . . . However, unlike Indians, or even Eskimos and other Alaskan Natives, they have not been dealt with comprehensively by Congress. Only since 1974 has Congress specifically included Native Hawaiians as beneficiaries in bills providing services to Native Americans. Thus, the full extent of the trust obligation owed by the United States to Native Hawaiians and the manner of its fulfillment has not yet been defined.

FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 797-98 (Rennard Strickland ed. 1982) (hereinafter "COHEN"). Similarly, the Supreme Court in the recent Rice decision specifically avoided deciding whether Congress

Page 1220] shown, nor could they show, that Congress has established such relations. Thus, the regulations that Plaintiffs challenge only pertain to those groups with whom Congress has established government-to-government relations. Plaintiffs misconstrue the inquiry at hand: in their challenge to the acknowledgment regulations, they posit that Congress has not specifically disallowed Native Hawaiian qualifications for Indian tribal sovereignty. While this may be true, it is irrelevant to the question of whether Congress has affirmatively entered into a government-to-government relationship, which Plaintiffs cannot show.[10] Thus, the challenged regulations do no

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had determined whether Native Hawaiians could be treated like Indians. Rice, 528 U.S. at 518-19, 120 S.Ct. 1044 ("It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. We can stay far off that difficult terrain.") (citations omitted). Indeed, the Ninth Circuit has even held, in another statutory context, that the term "Indian" applies to the "the aborigines of America." *Pence v. Kleppe*, 529 F.2d 135, 139 n. 4 (9th Cir. 1976).

[10] Plaintiffs also argue that the definitions of "Indian" and "Tribe" in the IRA do not exclude Native Hawaiians so they may include Native Hawaiians. The Court disagrees. First, the definition of "Indian" within the IRA states that it "include[s] all persons of Indian descent *who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934 . . . and shall further include all other persons of one-half or more Indian blood.*" 25 U.S.C. § 479 (emphasis added). This definition was intended to preserve the status quo with respect to whom should be considered an Indian. Representative Edgar Howard, who co-sponsored the IRA with Senator Burton Wheeler, made the following statements during the congressional debate regarding whom should be classed as an "Indian:"

> For purposes of this act, [the definitional section] defines the persons who shall be classed as Indian. *In essence, it recognizes the status quo of the present reservation Indians and further includes all other persons of one-fourth Indian blood.* The latter provision is intended to prevent persons of less than one-fourth Indian blood who are already enrolled members of a tribe or

[West Page 1221] more than effectuate congressional policy with respect to Native Hawaiians in the sense that Congress has

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> descendants of such members living on a reservation from claiming financial and other benefits of the act. Obviously the line must be drawn somewhere . .

Congressional Debate on Wheeler-Howard Bill (1934) *in* THE AMERICAN INDIAN AND THE UNITED STATES, Vol. III. (Random House 1973) (emphasis added) (the Court notes that the one-fourth Indian blood requirement, referenced above by Representative Howard, was subsequently altered in the statute to require a one-half Indian blood quantum). Several other factors within the purpose and history of the IRA make it abundantly clear that Native Hawaiians were not intended to be considered "Indians." First, the IRA was passed primarily to remedy the failed prior Indian policy of land allotment and increasing levels of Indian alienation of land. S.Rep. No. 1080 73d Cong (1934). The Supreme Court in *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 436 n. 1, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) recognized that the IRA was passed specifically to address the failed allotment policy and to remedy the loss of over 90 million acres of Indian land. Hawaii, either as a State or U.S. territory, never had a reservation program. Second, Plaintiffs ignore that aspect of the congressionally defined scope of the IRA's definition of an Indian in which Congress intended to extend the provisions of the IRA to the aboriginal people of Alaska (then a territory) but not to the aboriginal people of Hawaii. Such exclusion, at the very least, demonstrates Congress' intent to not enter a government-to-government relationship with Native Hawaiians in 1934. The Ninth Circuit in *Price* considered in dicta, without deciding, whether Hawaii's interceding admission to statehood may have altered the definition of Indian within the IRA with respect to Native Hawaiians. *Price,* 764 F.2d at 626. The Court notes that *Price*'s dictum does not provide an answer to the specific question raised in this case. Commentaries on the legislative history also confirm that Native Hawaiians were not included within the definition of Indian. Professor Elmer Rusco writes regarding the definitional section that the IRA applies to all persons of Indian descent who are members of any recognized tribe under federal recognition as of June 1, 1924 and thus, "many descendants of aboriginal societies, *including native Hawaiians*, are not legally defined as Indians to this day." ELMER RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE IRA 267 (UNLV Press 2000) (emphasis added).

not, as of yet, decided to enter a government-to-government relationship.

The Court also notes that while it proceeds with caution in construing legislative silence, it cannot ignore that Congress is keenly aware of the acknowledgment regulations and their exclusion of Native Hawaiians, yet has chosen not to act. *Cf. United Houma Nat. v. Babbit*, No. Civ. A. 96-2095 (JHG) 1997 WL 403425 at *8 (D.D.C. July 8, 1997). This congressional inaction manifests especial import when coupled with Congress' other statutes dealing with Native Hawaiians[11] and/or pending bills that would create a government-to-government relationship.[12]

The Court likewise appreciates the Executive Branch's ample authority to recognize tribes, and that such determination of tribal status has long been regarded as a political question inappropriate for judicial review. *See, e.g., United States v. Holliday*, 70 U.S. 407, 419, 3 Wall. 407, 18 L.Ed. 182 (1865) ("In reference to all matters of [Indian affairs], it is the rule of this court to follow the action of the executive and other political departments of the government. . . ."); *James*, 824 F.2d at 1137; *Baker*, 369 U.S. at 215-17, 82 S.Ct. 691 (identifying status of Indian tribes as "representative" of political question); *Western Shoshone*, 1 F.3d at 1057 ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition"); *Price v. State of Hawaii,* 764 F.2d 623, 628

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[11] A number of laws have been passed for the benefit of Native Hawaiians. *See, e.g.*, Hawaiian Homes Act, 42 Stat. 108 (1921).

[12] A bill known as the Akaka Bill was introduced by the Hawaiian congressional delegation during the 106th Congress that would create a government-to-government relationship between Native Hawaiians and the federal government similar to that between mainland Indian tribes and the federal government. S.Rr's. 746, 107th Cong. (2001). The bill is still pending, and would appear to be the course of action to pursue in order to achieve federal recognition of a "Native Hawaiian governing entity." *Id.*

(9th Cir. 1985) (offering reluctance "to intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence"). In addition to Plaintiffs' inability to show congressional recognition, Plaintiffs fail to show any prior Executive tribal recognition of Native Hawaiians.[13] [West Page 1222]

The Seventh Circuit recently addressed the political question doctrine in the Indian context. *Miami Nation*, 255 F.3d at 347-48. The court observed that the recognition of tribal status implicates that element of the political question doctrine "which focuses on the nature of the questions that the court would have to answer — which asks whether the answers would be ones a federal court could give without ceasing to be a court, ones within the cognitive competence, as distinct from the authority, of federal judges — is engaged by such a dispute." *Miami Nation,* 255 F.3d at 347. There, the court held that the Indiana Miami's challenge to the DOI's application of the regulatory criteria was the type of controversy amenable to judicial review. *Id.* The Seventh Circuit, however, further opined:

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[13] Indeed, Plaintiffs' reliance upon a report prepared by the DOI and Department of Justice in October 2000 that dealt at length with the political status of Native Hawaiians demonstrates, contrary to Plaintiffs' position, that recognition of Native Hawaiians clearly is a political issue requiring a political response. *From Mauka to Makai: The River of Justice Must Flow Freely*, Report on the Reconciliation Process Between the Federal Government and Native Hawaiians (Oct. 23, 2000) (the "Report"). In particular, the Report first recognizes the absence of a current government-to-government relationship: indicating that "[t]his reconciliation process should ultimately result in congressional confirmation of a political, government-to-government relationship between Native Hawaiians and the Federal Government pursuant to Congress' plenary power over Indian Affairs." Report at ii. Further, the Report recommended that "Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body." Report at 17.

> [I]f two residents of what was once the Kingdom of the Two Sicilies asked a federal court to recognize it as an independent nation, the court would invoke Luther v. Borden [48 U.S. (7 How.) 1, 12 L.Ed. 581 (1849)] and tell them to take it up with the State Department. The question of whether the [group of Native Americans suing for relief] constitutes a "nation" with a "government" with which the United States might establish relations is similar. It comes as no surprise, therefore, that "the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review."

Id. at 347 *citing* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 5 (3d Ed. 1998) (hereinafter "CANBY"); *Holliday*, 70 U.S. at 419, 3 Wall. 407; *Cherokee Nat. of Oklahoma v. Babbitt,* 117 F.3d 1489, 1496 (D.C.Cir. 1997); *Western Shoshone*, 1 F.3d at 1057; COHEN at 3-4.

Here, Plaintiffs' case clearly raises the concerns that the Seventh Circuit in *Miami Nation* noted in admonitory terms. The instant case is not a matter in which the Court is asked to review the grant or denial of tribal recognition under the Administrative Procedure Act to determine whether the DOI followed its own regulations. *See Miami Nation*, 255 F.3d at 348-49; CANBY at 5. Instead, Plaintiffs' arguments present a nonjusticiable matter because they ask the Court to supplant Congress' decision not to deal with Native Hawaiians as an Indian tribe. Indeed, Plaintiffs ask this Court in their complaint to enjoin the DOI from enforcing the acknowledgment regulations in a manner that excludes Native Hawaiians from the benefits and protections of the IRA and ISDEA. This request is a political one; and it is not subject to judicial review. In the words of the Supreme Court:

> [T]he questions whether, to what extent and for what time [Native Americans] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by

Congress, and not by the courts.

United States v. Sandoval, 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107 (1913).

The Court duly considered Plaintiffs' characterization of their claim as consisting only of the request for the opportunity to apply to be acknowledged versus asking for acknowledgment outright. Despite Plaintiffs' portrayal of their relief; their requested relief necessarily involves the Court in deciding whether the DOI, and Congress, have inappropriately excluded Native Hawaiians from tribal recognition. As such, the Court lacks jurisdiction to judge the propriety of Congress' decision to not, as of yet, recognize Native Hawaiians as an Indian tribe. [West Page 1223]

Accordingly, the Court GRANTS Defendant's motion to dismiss Plaintiffs' complaint because it raises a political question and therefore the Court does not reach Defendant's remaining arguments advanced in support of dismissal. For this reason, the Court DENIES Plaintiffs' counter-motion for summary judgment.[14]

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[14] Notwithstanding that the Court finds that this matter is nonjusticiable, the Court finds that the acknowledgment regulations, even if subject to a justiciable challenge, do not violate the Fifth Amendment. Plaintiffs do not challenge, at least directly, the classification of "Indian" embodied in the ISDEA or IRA; rather, as discussed earlier, they challenge the acknowledgment regulations' exclusion of Native Hawaiians as unlawful racial discrimination violative of the equal protection component of the Fifth Amendment.

The appropriate standard of review for Plaintiffs' constitutional challenge to these regulations, if justiciable, would be the rational basis standard. *Morton v. Mancari*, 417 U.S. 535, 555, 94 S.Ct. 2474, 41 L.Ed.2d 290 ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."); *United States v. Nuesca*, 945 F.2d 254, 257 (9th Cir. 1991) (rejecting strict scrutiny review in equal protection challenge by Native Hawaiians based upon differential treatment of Alaskan tribes); *Duro v. Reina*, 860 F.2d 1463. 1467 (9th Cir. 1988) (discussing rational

basis standard for Indian preferences). Moreover, utilization of the rational basis standard to review Indian laws and regulations is well established. *Morton*, 417 U.S. at 554-55, 94 S.Ct. 2474; *United States v. Antelope*, 430 U.S. 641, 645-46, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977); *U.S. v. Male Juvenile*, 280 F.3d 1008, 1016 (9th Cir. 2002) (finding no equal protection violation to exist "because the difference in treatment [under the challenged statute] between an Indian and a non-Indian arises from his political membership in the tribe rather than from his race.") (citations emitted); *Narragansett Indian Tribe v. Nat. Indian Gaming Comm'n*, 158 F.3d 1335, 1339-41 (D.C.Cir. 1998).

In *Morton,* the Supreme Court evaluated an Indian employment preference and rejected the challenger's argument that the Indian preference constituted illegal racial discrimination or even preferential treatment. 417 U.S. at 553-54, 94 S.Ct. 2474; COHEN at 19 ("In dealing with Indians, the federal government is dealing with members or descendants of political entities, that is, Indian tribes, not with persons of a particular race"). Instead, the Court, which recognized Congress' plenary power with respect to Indian affairs, upheld the preference because it served the cause of Indian self-government. *Morton*'s analysis applies here with equal force. First, the statutory schemes embodied in IRA and ISDEA, which are not directly challenged by Plaintiffs, are legitimate expressions of congressional prerogative to legislate on behalf of Indians. Those schemes, for the reasons stated below, pass muster under rational basis review. *See, e.g.*, *Nuesca*, 945 F.2d at 257 (rejecting equal protection challenge, under rational basis review, by Native Hawaiians seeking similar fishing rights as Alaskan tribes under environmental laws). These statutory schemes relate to the protection, services and benefits that Congress extends to federally recognized tribes and the acknowledgment regulations rationally relate to the congressional prerogative to limit the benefits of Indian-based legislation to only those Indian tribes that are recognized as such. These regulations were issued pursuant to the Secretary's general statutory power delegated by Congress. 25 U.S.C. § 1, 9. Because Congress has not entered into a government-to-government relationship with Native Hawaiians, it is entirely rational for the Secretary to exclude Hawaii from the scope of the acknowledgment regulations. Indeed, the Ninth Circuit in *Price* commented directly upon these regulations, and the particular complained of section and made no mention whatsoever of any constitutional infirmity. *Price*, 764 F.2d at 626-27. Moreover, a number of other courts have considered these

CONCLUSION

For the foregoing reasons, the Court GRANTS the Defendant's motion to dismiss and DENIES Plaintiffs' counter-motion for summary judgment. Again, it would appear that the course of action to achieve a government-to-government relationship between Native Hawaiians and [West Page 1224] the federal government would be to pursue the pending Akaka Bill.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, Aug. 30, 2002.

Alan C. Kay,

United States District Judge

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regulations and rejected challenges made to them. *See James*, 824 F.2d at 1132; *Western Shoshone*, 1 F.3d at 1058.

(2)

Supreme Court, U.S.
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No. 04-1041

In the Supreme Court of the United States

PATRICK L. KAHAWAIOLAA, ET AL., PETITIONERS

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the exclusion of Hawaii from the territorial scope of regulations governing acknowledgment of Indian Tribes by the Secretary of the Interior, 25 C.F.R. Pt. 83, violates the equal protection component of the Fifth Amendment's Due Process Clause.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Brendale v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) 2

Delaware Tribal Bus. Comm. v. *Weeks*, 430 U.S. 73 (1977) 9

Fisher v. *District Court*, 424 U.S. 382 (1976) 9

Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) 9

Morton v. *Mancari*, 417 U.S. 535 (1974) 2, 8, 9

Narragansett Indian Tribe v. *National Indian Gaming Comm'n*, 158 F.3d 1335 (D.C. Cir. 1998) 9

Rice v. *Cayetano*, 528 U.S. 495 (2000) 7, 8, 9

United States v. *Antelope*, 430 U.S. 641 (1977) 8

United States v. *Holliday*, 70 U.S. (3 Wall.) 407 (1866) 12

United States v. *Lara*, 541 U.S. 193 (2004) 12

United States v. *Nuesca*, 945 F.2d 254 (9th Cir. 1991) 9

Cases—Continued: Page

Washington v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) 9

Washington v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) 8

Constitution, statutes and regulations:

U.S. Const.:

Amend. V 5

Due Process Clause 5, 7

Amend. XV 7

American Indian, Alaska Native, and Native Hawaiian Culture and Arts Development Act, 20 U.S.C. 4402 11

General Allotment Act, ch. 119, 24 Stat. 388 2

Indian Financing Act of 1974, 25 U.S.C. 1452(c) 3

Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.* 9

Indian Reorganization Act, 25 U.S.C. 461 *et seq.* 1

25 U.S.C. 461 2

25 U.S.C. 464 2

25 U.S.C. 470 2

25 U.S.C. 476 ..... 2, 3

25 U.S.C. 476(a)(2) 3

25 U.S.C. 477 3

25 U.S.C. 479 3

Statutes and regulations—Continued: Page

Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450-450n 3
25 U.S.C. 450b(e) 3
Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 *et seq.*:
25 U.S.C. 3001(6) 11
25 U.S.C. 3001(7) 11
25 U.S.C. 3001(10) 11
25 U.S.C. 3001(11) 11
25 U.S.C. 3001(12) 11
Native American Programs Act of 1974, 42 U.S.C. 2992c 11
Native Hawaiian Education Act, 20 U.S.C. 7901 *et seq.* 11
Native Hawaiian Health Care Act of 1988, 42 U.S.C. 11701 *et seq.* 11
42 U.S.C. 11701(1) 10
25 U.S.C. 2 4
25 U.S.C. 9 4
25 U.S.C. 1300j-1 10
25 U.S.C. 1300k-2 10
25 U.S.C. 1300*l* 10
25 U.S.C. 1300m 10
25 U.S.C. 1300n 10
25 U.S.C. 1758 10
43 U.S.C. 1457 4
25 C.F.R. Pt. 83 ..... 4, 5
Section 83.1 5

Statutes and regulations—Continued: Page

Section 83.2 4

Section 83.3(a) 5

Section 83.12(a) 4

Miscellaneous:

Felix S. Cohen, *Handbook of Federal Indian Law* (1942) 4

42 Fed. Reg. 30,647 (1977) 4

43 Fed. Reg. (1978):

p. 23,743 4

p. 39,361 4

p. 39,362 5

59 Fed. Reg. 9280 (1994) 4

H.R. 374, 109th Cong., 1st Sess. (2005) 11

Lewis Meriam et al., Institute for Government Research, *The Problem of Indian Administration* (1928) 2

S. 147, 109th Cong., 1st Sess. (2005) 11

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 386 F.3d 1271. The opinion of the district court (Pet. App. A22-A41) is reported at 222 F. Supp. 2d 1213.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2004. The petition for a writ of certiorari was filed on January 25, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1934, Congress enacted the Indian Reorganization Act (IRA or Act), 25 U.S.C. 461 *et seq.*, in direct response to the findings of the *Meriam Report* commis-

sioned by the federal government. See Lewis Meriam et al., Institute for Government Research, *The Problem of Indian Administration* (1928) (*Meriam Report*). The *Meriam Report* exhaustively documented and analyzed the effects of previous Indian policies, including in particular the policy under the General Allotment Act, ch. 119, 24 Stat. 388, of allotting tracts of reservation lands to individual tribal members, which faciliated alienation of the land to non-Indians and the breakup of the tribal structure. The *Meriam Report* recommended that the government fashion a more decentralized Indian policy focused on the tribal unit. The purpose of the IRA was to halt the allotment policy and "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974); see *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 436 (1989) (opinion of Stevens, J.) (recognizing that the IRA was passed specifically to address the failed allotment policy and to remedy the loss of over 90 million acres of Indian land).[1]

There were no reservations and no allotment system in the Territory of Hawaii, and the IRA was not made applicable to native Hawaiian groups. The IRA, in contrast, did apply to native Alaskan groups. The Act defined the term "Indian" to:

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[1] The Act ended the practice of dividing reservation lands into individual allotments, 25 U.S.C. 461; prohibited further alienation of Indian lands and interests except with respect to consolidation of tribal lands, 25 U.S.C. 464; established loans for economic development of tribes, 25 U.S.C. 470; and empowered Tribes to reorganize and adopt a constitution and bylaws, employ legal counsel, exert control over tribal lands, and negotiate with federal, state, and local governments, 25 U.S.C. 476.

> include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and [to] further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

25 U.S.C. 479. The term "tribe" as used in the Act "refer[s] to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Ibid.*

The benefits of the IRA were made available only to Indian Tribes recognized by the federal government (and to certain descendants of the members of such Tribes). See 25 U.S.C. 476(a)(2), 477, 479; Pet. App. A3. To organize as an Indian Tribe under the IRA, for instance, a Tribe's bylaws and constitution were required to be approved by the Secretary of the Interior. 25 U.S.C. 476. In the early 1970s, Congress passed a series of additional statutes that likewise conditioned an Indian Tribe's eligibility for various benefits on federal tribal recognition. See, *e.g.*, 25 U.S.C. 450b(e) (definition of Indian Tribe for purposes of Indian Self-Determination and Education Assistance Act (ISDEA), 25 U.S.C. 450-450n); 25 U.S.C. 1452(c) (definition of Indian Tribe for purposes of Indian Financing Act of 1974).

Although the IRA and subsequent statutes conditioned tribal eligibility on federal recognition, no legislation spoke directly to the question of how to determine which groups were federally recognized. Before the late 1970s, the Department of the Interior made decisions to acknowledge tribal status on an essentially *ad hoc* basis.

See 43 Fed. Reg. 39,361 (1978); see also Felix S. Cohen, *Handbook of Federal Indian Law* 268-272 (1942). By the mid-1970s, however, the Department concluded that the "recent increase in the number of [acknowledgment] requests before Interior necessitates the development of procedures to enable that a uniform and objective approach be taken to their evaluation." 42 Fed. Reg. 30,647 (1977).

In 1978, accordingly, the Department, acting pursuant to its general authority over "the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. 2; see 25 U.S.C. 9; 43 U.S.C. 1457, promulgated regulations establishing a process for acknowledging that certain groups exist as Indian tribes. See 42 Fed. Reg. at 30,647; 43 Fed. Reg. at 23,743; *id.* at 39,361. Those regulations were revised in 1994, see 59 *id.* 9280, and they are now codified at 25 C.F.R. Pt. 83. The purpose of the regulations

> is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.

25 C.F.R. 83.2; see 25 C.F.R. 83.12(a).

Since their inception in 1978, the regulations have excluded native groups in Hawaii from eligibility to petition for federal acknowledgment. The acknowledgment regulations are applicable "only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department." 25 C.F.R. 83.3(a); see 43 Fed. Reg. at 39,362. The regulations in turn define "Continental United States" as the "contiguous 48 states and Alaska." 25 C.F.R. 83.1.

2. On May 23, 2002, petitioners filed an amended complaint alleging that they are individual native Hawaiians and a native Hawaiian group, and that they wish to apply for federal recognition as an Indian Tribe pursuant to 25 C.F.R. Part 83. Petitioners contended that their exclusion from the regulations constitutes impermissible racial discrimination in violation of the equal protection component of the Fifth Amendment. Pet. 3; Pet. App. A5.

The district court granted the Secretary's motion to dismiss. Pet. App. A22-A41. The court first held that the complaint raised a nonjusticiable political question because it asked the court "to supplant Congress' decision not to deal with Native Hawaiians as an Indian tribe." *Id.* at A38-A39. In the alternative, the court ruled in favor of the Secretary on the merits, holding that the acknowledgment regulations do not violate the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at A39-A40 n.14. The court applied the rational basis standard, and found that, "[b]ecause Congress has not entered into a government-to-government relationship with Native Hawaiians, it is entirely rational for the Secretary to exclude Hawaii

from the scope of the acknowledgment regulations." *Ibid.*

3. The court of appeals affirmed as to the merits. Pet. App. A1-A21.[2] The court concluded that, because "the formal relationship between the United States and American Indian tribes has been political, rather than race-based," petitioners' equal protection challenge should be reviewed under the rational basis test. *Id.* at A11. The court observed that the IRA—the "origin of the acknowledgment regulations"—did not include any native Hawaiian group, and although Alaska and Hawaii were both territories in 1934, only Alaska was specifically included. *Id.* at A15-A16. The court noted that there were no reservations in Hawaii and that Congress in the IRA and other statutes "has evidenced an intent to treat Hawaiian natives differently from other indigenous groups." *Id.* at A16-A17.

The court further explained that "the history of the indigenous Hawaiians, who were once subject to a government that was treated as a co-equal sovereign alongside the United States," is "fundamentally different from that of indigenous groups and federally recognized Indian tribes in the continental United States." Pet. App. A19. The court also found it significant that Congress has distinguished between native Hawaiians and

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[2] The court disagreed with the district court's conclusion that the case presents a nonjusticiable political question. Pet. App. A7-A10. The court of appeals reasoned that a political question would be presented if petitioners had sought to compel tribal recognition of native Hawaiians. *Id.* at A7-A8. The court determined, however, that petitioners did not demand federal recognition of native Hawaiians, but instead sought to invalidate regulations barring them from applying for recognition based on the same criteria that apply to indigenous groups in other States. *Id.* at A10.

Indian Tribes in a number of statutes. *Id.* at A19-A20. In light of the "unique history of Hawaii" and "the historical restrictions of the acknowledgment process to continental American Indian tribes," the court held that the acknowledgment regulations rationally exclude native Hawaiian groups from their scope. *Id.* at A20.

ARGUMENT

Petitioners renew their contention (Pet. 13-14) that the exclusion of native groups in Hawaii from eligibility to petition for federal acknowledgment as an Indian Tribe under Department of the Interior regulations violates the equal protection component of the Fifth Amendment's Due Process Clause. The court of appeals correctly rejected that claim, and the court's decision does not conflict with any decision of this Court or another court of appeals. Further review therefore is not warranted.

Petitioners argue (Pet. 13-14) that this Court's decision in *Rice* v. *Cayetano*, 528 U.S. 495 (2000), establishes that the exclusion of native groups in Hawaii from eligibility for federal recognition constitutes impermissible race-based discrimination and that the exclusion therefore should be subject to strict scrutiny. *Rice* involved a voting scheme under Hawaii law that limited eligibility to vote for trustees of a certain state agency to descendants of persons who had inhabited the Hawaiian Islands in 1778. The Court concluded that the Hawaii law used ancestry as a proxy for race, and that the ancestry requirement constituted a racial definition and was intended to serve a racial purpose. *Id.* at 514-515. The Court therefore held that the voting classification discriminated on the basis of race in violation of the Fifteenth Amendment. *Id.* at 514-522.

As the court of appeals explained below, nothing in *Rice* casts doubt on the validity of the acknowledgment regulations at issue in this case. Pet. App. A12-A14. To the contrary, *Rice* specifically distinguished and reaffirmed this Court's decisions upholding classifications concerning Indian Tribes under federal law as political rather than racial in nature. See *Rice*, 528 U.S. at 519-520. The Court explained in *Rice* that, in *Morton* v. *Mancari*, 417 U.S. 535 (1974), it had upheld a hiring preference in the Bureau of Indian Affairs for members of federally recognized Indian Tribes. Unlike the voting scheme at issue in *Rice*, which used ancestry as a proxy for race, the hiring preference in *Mancari* was "political rather than racial" because it was "not directed towards a 'racial' group consisting of 'Indians'" but towards "members of 'federally recognized tribes.'" *Rice*, 528 U.S. at 519-520 (quoting *Mancari*, 417 U.S. at 553 n.24).

Under *Rice* and *Mancari*, accordingly, the "recognition of Indian tribes remains a political, rather than racial determination." Pet. App. A14. It follows that the rules governing eligibility for federal tribal recognition, including the regulations at issue in this case, do not establish racial classifications. Those rules instead fall squarely within the rubric of "federal regulation of Indian affairs," which is "not based upon impermissible classifications" but "is rooted in the unique status of Indians as a 'separate people' with their own political institutions." *United States* v. *Antelope*, 430 U.S. 641, 64[illegible] (1977) (quoting *Mancari*, 417 U.S. at 553 n.24); *ibid.* ("[illegible]ederal regulation of Indian tribes * * * is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'") (quoting *Mancari*, 417 U.S. at 553 n.24); see *Washington* v. *Washington State Commercial Pas-*

senger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979); *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 85-90 (1977); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-480 (1976); *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976). [3]

Because the exclusion of native groups in Hawaii from eligibility for federal tribal recognition under Interior Department regulations does not constitute invidious race-based discrimination, the court of appeals correctly applied rational basis review. See *Mancari*, 417 U.S. at 553-555 (upholding hiring preference for members of federally-recognized Tribes on rational basis review); *Weeks*, 430 U.S. at 85-90 (applying rational basis standard in upholding judgment distribution to federally recognized Tribes); *Narragansett Indian Tribe* v. *National Indian Gaming Comm'n*, 158 F.3d 1335, 1339-1341 (D.C. Cir. 1998) (applying rational basis review and rejecting Tribe's challenge to its exclusion from the benefits accorded other Tribes by the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*); *United States* v. *Nuesca*, 945 F.2d 254, 257-258 (9th Cir. 1991) (applying rational basis standard and rejecting equal protection challenge brought by native Hawaiians based on differ-

[3] In *Rice*, moreover, this Court emphasized that the voting scheme at issue did not involve elections affecting the internal affairs of an Indian Tribe, but instead involved elections for a state agency responsible for administering state law and obligations. 528 U.S. at 520. The Court thus determined that, "[t]o extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs." *Id.* at 522. The rules concerning federal recognition of Indian Tribes, by contrast, uniquely concern administration of the United States' distinctive government-to-government relationship with Indian Tribes.

ential treatment with respect to hunting rights as compared to Alaskan natives). There is no warrant for reviewing the court of appeals' application of rational basis review in this case. Indeed, petitioners do not contend that they can prevail under the rational basis standard.

In any event, the court of appeals correctly held that the exclusion of native Hawaiian groups satisfies the rational basis test in view of the origin of the acknowledgment regulations, the unique history of Hawaii and its relationship to the United States, and the historical limitation of the acknowledgment process to continental Indian Tribes. Pet. App. A15-A20; see 42 U.S.C. 11701(1) (finding by Congress that "[n]ative Hawaiians comprise a distinct and unique indigenous people"). The history of native Hawaiians is "fundamentally different from that of * * * Indian tribes in the continental United States," Pet. App. A19, and the distinction is reflected in Congress's enactments.

Two of the foundational Acts of Congress establishing current federal Indian policy, the IRA and ISDEA, exclude native Hawaiians from their scope. And while Congress has enacted legislation establishing a government-to-government relationship with specific Indian tribes,[4] Congress has enacted no such legislation providing that native Hawaiians or any group of native Hawaiians constitute an Indian tribe. When Congress

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[4] See, *e.g.*, 25 U.S.C. 1300j-1 (extending "[f]ederal recognition" and statutes of "general application to Indians and Indian tribes" to the Pokagon Band of Potawatomi Indians); 25 U.S.C. 1300k-2 (same, Little Traverse Bay Band of Odawa Indians and the Little River Band of Ottawa Indians); 25 U.S.C. 1758 (same, Mashantucket Pequot Tribe); 25 U.S. C. 1300*l* (restoring federal relationship with Auburn Indian Tribe); 25 U.S.C. 1300m (same, Paskenta Band of Nomlaki Indians of California); 25 U.S.C. 1300n (same, Graton Rancheria of California).

has established discrete programs for native Hawaiians, it has done so based solely on their status as native Hawaiians, taking care to refer to native Hawaiians as a group distinct from Indian Tribes or Indians.[5] Consistent with the understanding that native Hawaiian groups do not constitute Indian Tribes, legislation has been proposed in recent years that would create a process for establishing a government-to-government relationship with a native Hawaiian governing body. See Pet. 8-9; see, *e.g.*, H.R. 374, 109th Cong., 1st Sess. § 1 (2005); S. 147, 109th Cong., 1st Sess. § 1 (2005). Congress, however, has yet to recognize native Hawaiians as an Indian Tribe or otherwise establish a government-to-government relationship with them. In these circumstances, it is fully rational for the Secretary of the Interior to exclude native groups in Hawaii from petitioning for acknowledgment as an Indian Tribe under the acknowledgment regulations.[6]

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[5] Some legislation pertains only to native Hawaiians. *E.g.*, Native Hawaiian Health Care Act of 1988, 42 U.S.C. 11701 *et seq.*; Native Hawaiian Education Act, 20 U.S.C. 7901 *et seq.* Other legislation pertains to both native Hawaiians and Indian Tribes. Where Congress has made legislation applicable to both Indian Tribes and native Hawaiians, Congress has taken care to define them separately. See, *e.g.*, American Indian, Alaska Native, and Native Hawaiian Culture and Arts Development Act, 20 U.S.C. 4402 (separate definitions for Indian tribe and native Hawaiian); Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001(6), (7), (10), (11) and (12) (same); Native American Programs Act of 1974, 42 U.S.C. 2992c (separate definitions for "Indian tribe," Native Hawaiian, and "Native American Pacific Islander").

[6] Petitioners suggest (Pet. 8) that native Hawaiian groups should not be forced to rely on legislative action by Congress to establish a government-to-government relationship with the United States. The power to recognize Indian Tribes, however, is essentially committed to the political Branches. As this Court has explained, the "Constitution

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2005

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grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court has] consistently described as 'plenary and exclusive.'" *United States* v. *Lara*, 541 U.S. 193, 200 (2004); see *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866). Accordingly, petitioners should direct to Congress, rather than the courts, their concerns with the substance of proposed legislation that would provide a process for recognizing a governing entity for native Hawaiians. See Pet. 8-11.

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REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities i

Statement of the Case 1

A. Reservations and Allotment System 1
B. Indigenous Hawaiians and indigenous Alaskans. 2

Argument 3

A. Importance of this case 3
B. Merits of the case. 4

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc., v. Pena, 515 U.S. 200 (1995) 5
Morton v. Mancari, 417 U.S. 535 (1974) 4, 5
Rice v. Cayetano, 528 U.S. 495 (2000) 3

Statutes:

48 Stat. 985, § 13 2
48 Stat. 985, § 19 2
49 Stat. 1250, ch. 254, § 1 (May 1, 1936) 2
Hawaiian Homes Commission Act, 1920 1
Indian Reorganization Act, 25 U.S.C. § 461 *et seq.* .. 2, 5, 6
Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450-450n 5, 6

Rules:

25 C.F.R., Part 83 ..... 4, 7
Rules of the U.S. Supreme Court, Rule 10 3

Miscellaneous:

Akaka, Daniel, "Akaka bill a part of vital process," Honolulu Star-Bulletin, May 1, 2005 4
Cook's Log, ISSN 1358-0639, vol 6, no. 2 (1983) 6
Faludi, Susan C., "Broken Promise: How Everyone Got Hawaiians' Homelands Except Hawaiians", *Wall Street Journal*, September 9, 1991 2
Federal-State Task Force on the Hawaiian Homes Commission Act Report to United States Secretary of the Interior and the Governor of the State of Hawaii, Honolulu, Hawaii, August, 1983 2
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In the
Supreme Court of the United States

PATRICK L. KAHAWAIOLAA, ET AL., *Petitioners,*
v.
GALE NORTON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Reservations and Allotment System

In the Statement portion of her Brief in Opposition, Respondent states that there were no reservations and no allotment system in the Territory of Hawaii. Brief in Opposition ("Br.Op."), p. 2. This is incorrect.

In 1928, at the time of the *Meriam Report,* the Hawaiian Homes Commission Act, 1920 [HHCA], was already in effect, setting aside 203,000 acres of land for 99-year homestead leases exclusively and specifically reserved for native Hawaiians. As such, the Hawaiian home lands are reservations for native Hawaiians. The HHCA set aside lands for domestic dependent communities of native Hawaiians not unlike the Pueblos recognized by this Court in the landmark case of *United States v. Sandoval,* 231 U.S. 28 (1913)

The homestead leases awarded to beneficiaries under the HHCA while not "allotments" under the General Allotment Act, are awards of land exclusively and specifically reserved to individual native Hawaiians similar to allotments. Being leasehold interests, these awards are not alienable and have not resulted in the breakup of the homestead lands. However, lack of self-determination and control over their native lands has

caused many of the same problems for indigenous Hawaiians as for other indigenous Americans. *See Federal-State Task Force on the Hawaiian Homes Commission Act Report to United States Secretary of the Interior and the Governor of the State of Hawaii,* Honolulu, Hawaii, August, 1983; *Hawaiian Homes Commission,* U.S. Dept. of the Interior, Office of Inspector General, Audit Report, Rep. No. 92-I-641, March, 1992; *Management and Financial Audit of the Department of Hawaiian Home Lands,* Auditor of the State of Hawaii, Rep. No. 93-22, December, 1993; Faludi, Susan C., "Broken Promise: How Everyone Got Hawaiians' Homelands Except Hawaiians", *Wall Street Journal,* September 9, 1991, p. 1.

B. Indigenous Hawaiians and indigenous Alaskans.

Respondent states that the "IRA was not made applicable to native Hawaiian groups," but it "did apply to native Alaskan groups." Br.Op., p. 2. This statement may be technically true, but is misleading.

The Indian Reorganization Act [IRA] *does not exclude* indigenous Hawaiians. Section 13 of the IRA as originally enacted, excluded territories, colonies and insular possessions from the Act, with the exception that sections 9-12 and 16 were made applicable to Alaska. 48 Stat. 985, § 13 (1934). Indigenous Hawaiians were excluded *at that time* because Hawaii was a territory. Also, the term "Indian" was defined as certain persons of "Indian descent" or "Indian blood." *Id.,* § 19. Eskimos and other aboriginal Alaskans were specifically listed as included within this definition, but indigenous Hawaiians were not mentioned specifically as included or excluded. *Id.*

In 1936, Congress extended the application of the IRA to Alaska further by making sections 1, 5, 7, 8, 15, 17 and 19 applicable there as well. 49 Stat. 1250, ch. 254, § 1 (May 1, 1936). Presumably, the remaining sections of the IRA became applicable to Alaska upon Alaska's admission to the Union in

1959. Similarly, all of the provisions of the IRA would have become applicable to Hawaii upon *its* admission to the Union in 1959.

ARGUMENT

A. Importance of this case

Respondent argues that certiorari should be denied because the decision of the court below was correct and does not conflict with any of the decisions of other circuits or this court. Br.Op., p. 7.

Petitioners did not argue the merits of the case in the petition, but instead argued, pursuant to Rule 10 of the Rules of the U.S. Supreme Court, that this case involves an "important question of federal law that has not been, but should be, settled by this Court." Respondent did not address the importance issue in her brief in opposition.

On page 7 of the Brief in Opposition, Respondent incorrectly, states "Petitioners argue (Pet. 13-14) that this Court's decision in *Rice v. Cayetano,* 528 U.S. 495 (2000), establishes that the exclusion of native groups in Hawaii from eligibility for federal recognition constitutes impermissible race-based discrimination." Actually, Petitioners argued that this case is *important* because the decision below validates discrimination *against* indigenous Hawaiians under the rational basis standard, while *Rice* applied the strict scrutiny standard to discrimination *in favor* of indigenous Hawaiians.

Of course, Petitioners argued on the merits below that the *Rice* standard should be applied to the exclusion of indigenous Hawaiians from the acknowledgment regulations. Petitioners would renew that argument on the merits in this Court if certiorari is granted. However, the *fact* that a more lenient standard has been used to justify discrimination *against* indigenous Hawaiians than the standard applied to discrimina-

tion in their *favor* should be considered in determining whether this is an important case worthy of review by this Court.

Since the Petition was filed, further evidence of the importance of this case came to light in an article by Senator Akaka where he admitted the purpose of his "Recognition Bill" (reintroduced in the current session as S.B. 147) is to settle land claims as follows:

> Following the recognition of the Hawaiian governing entity, negotiations between the entity and the federal and state governments will begin to address the potential transfer and control of lands, natural resources and assets, and the exercise of governmental authority by the Hawaiian governing entity. This is the structured process that we have needed in the past to address longstanding issues resulting from the overthrow of the kingdom of Hawaii.

"Akaka bill a part of vital process," Honolulu Star-Bulletin, May 1, 2005, p. F7.

Therefore, this case is very important because the decision of the court of Appeals below excludes existing indigenous Hawaiian tribal groups (if indeed, any such group exists under the criteria set forth in 25 C.F.R., Part 83) from participation in these decisions determining the disposition of their tribal lands.

B. Merits of the case.

Petitioners did not consider that the petition was the proper place to argue the merits of the case. However, since Respondent has argued the merits, Petitioners must briefly respond.

Respondent argues that the Court below correctly held that the exclusion of indigenous Hawaiians from the acknowledgment regulations is not race based, because it involves the political classification of Indian tribes, citing *Morton v. Mancari*, 417 U.S. 535 (1974). Br.Op., p. 8. However, the challenged regulation does not discriminate between Indian

tribes. It discriminates between groups of indigenous people and, in fact, that discrimination excluding indigenous Hawaiians is race based.

Consider a regulation providing for the acknowledgment of indigenous groups that specifically prohibited Eskimos from applying. Surely, such a regulation would be race based. The court would not entertain an argument that the historical differences between Eskimos and other indigenous groups rendered the discrimination non-racial. Any such discrimination could be justified only under the strict scrutiny standard of *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 227 (1995).

The only difference between this hypothetical regulation and the challenged regulation is that the exclusion of indigenous Hawaiians is not specifically stated. Instead, the discrimination is purportedly geographic. However, the only indigenous people in the excluded geographical area are indigenous Hawaiians. This geographical classification is, indeed, a disguised race based discrimination against indigenous Hawaiians that must be reviewed under the strict scrutiny standard just as an exclusion of Eskimos would be.

Respondent further argues that exclusion of indigenous Hawaiians from the acknowledgment regulations is justified by their exclusion by Congress from the IRA and the Indian Self-Determination and Education Assistance Act, [ISDEA]25 U.S.C. 450-450n. Br.Op., p. 10. As argued above, indigenous Hawaiians have not been excluded from the IRA. Indigenous Hawaiians are not specifically included as are Eskimos, but they are not specifically excluded either. Petitioners have argued below that the term "Indian" as used in the IRA, must be defined in the broadest possible Constitutional sense to include *all* indigenous tribal people regardless of race. Petitioners cited contemporary reports by early explorers referring to indigenous Hawaiians as "Indians." *Cook's Log*, ISSN 1358-0639, vol 6,

no. 2, p. 192 (1983).

As for the ISDEA, it is applicable to recognized Indian tribes, pursuant to 25 U.S.C. § 450b(e). Thus, the only thing that excludes indigenous Hawaiians from the ISDEA is the challenged regulation preventing their application for acknowledgment of their recognition.

Moreover, even if the IRA and/or ISDEA did specifically exclude indigenous Hawaiians from their applicability, that discrimination would also be subject to strict scrutiny review. The purpose of the IRA and ISDEA is to give indigenous Americans control over their own tribal lands, free from interference by the government. Indigenous Hawaiians suffer from the same negative effects of government management of their homelands. There is nothing in the history of Hawaii that would justify the denial of the right of self-determination to indigenous Hawaiians. An unconstitutional discrimination by Congress cannot be used to justify an unconstitutional discrimination by the Respondent.

The final two sentences of Respondent's argument demonstrate its flaw, as follows:

> Congress, however, has yet to recognize native Hawaiians as an Indian Tribe or otherwise establish a government-to-government relationship with them. In these circumstances, it is fully rational for the Secretary of the Interior to exclude native groups in Hawaii from petitioning for acknowledgment as an Indian Tribe under the acknowledgment regulations.

Br.Op., p. 11.

The fallacy of this argument is apparent. It is circular. Indigenous Hawaiian are not entitled to apply for acknowledgment of recognition because they have not been recognized. Petitioner cannot argue that Congress has yet to recognize native Hawaiians as an Indian Tribe unless and until indigenous

Hawaiian groups have had an opportunity to present their evidence and have it evaluated under the standards established in 25 C.F.R., Part 83. Whether Congress has recognized native Hawaiians, is not an issue in this case. That question can be answered only *after* an application is made and the standards applied.

Based on Respondent's firm and fast belief that indigenous Hawaiians have not been recognized by Congress as an Indian tribe or tribes, it is very likely that any application submitted by an indigenous Hawaiian group would be denied. But in that case, at least there would be an evidentiary record as to the factual basis for the group's claim of tribal existence. It is a denial of due process for a court to make this kind of determination without any evidentiary record.

CONCLUSION

Based on the foregoing argument and authorities, Petitioners respectfully request this Honorable Court to grant certiorari to review the opinion of the Ninth Circuit Court of Appeals.

Dated: Honolulu, Hawaii, May 25, 2005.

Respectfully submitted,
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